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COMMENTARIES.



AN INTERESTING
A P P E N D I X

TO

Sir William Blackstone's COMMENTARIES
ON THE
LAWS OF ENGLAND.

CONTAINING,

I. PRIESTLEY's Remarks on some Paragraphs in the Fourth Volume of BLACKSTONE's Commentaries, relating to the Dissenters.

II. BLACKSTONE's Reply to PRIESTLEY's Remarks.

III. PRIESTLEY's Answer to BLACKSTONE's Reply.

IV. The Case of the late Election of the County of Middlesex considered on the Principles of the constitution and the Authorities of Law.

V. FURNEAUX's Letters to the Hon. Mr. Justice BLACKSTONE concerning his Exposition of the Act of Toleration, and some Positions relative to Religious Liberty, in his celebrated Commentaries on the Laws of England.

VI. Authentic Copies of the Argument of the late Hon. Mr. Justice FOSTER in the Court of Judges Delegates, and of the Speech of the Right Hon. Lord MANSFIELD in the House of Lords, in the Cause between the City of London and the Dissenters.

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REMARKS

ON

SOME PARAGRAPHS

In the FOURTH VOLUME of

Dr. BLACKSTONE's Commentaries on the
LAWS OF ENGLAND.

RELATING TO

THE DISSENTERS.

By JOSEPH PRIESTLEY, LL. D. F. R. S.

— *Quis tam ferreus, ut teneat se,
Caufidici nova cum veniat leticia Mathonis.*

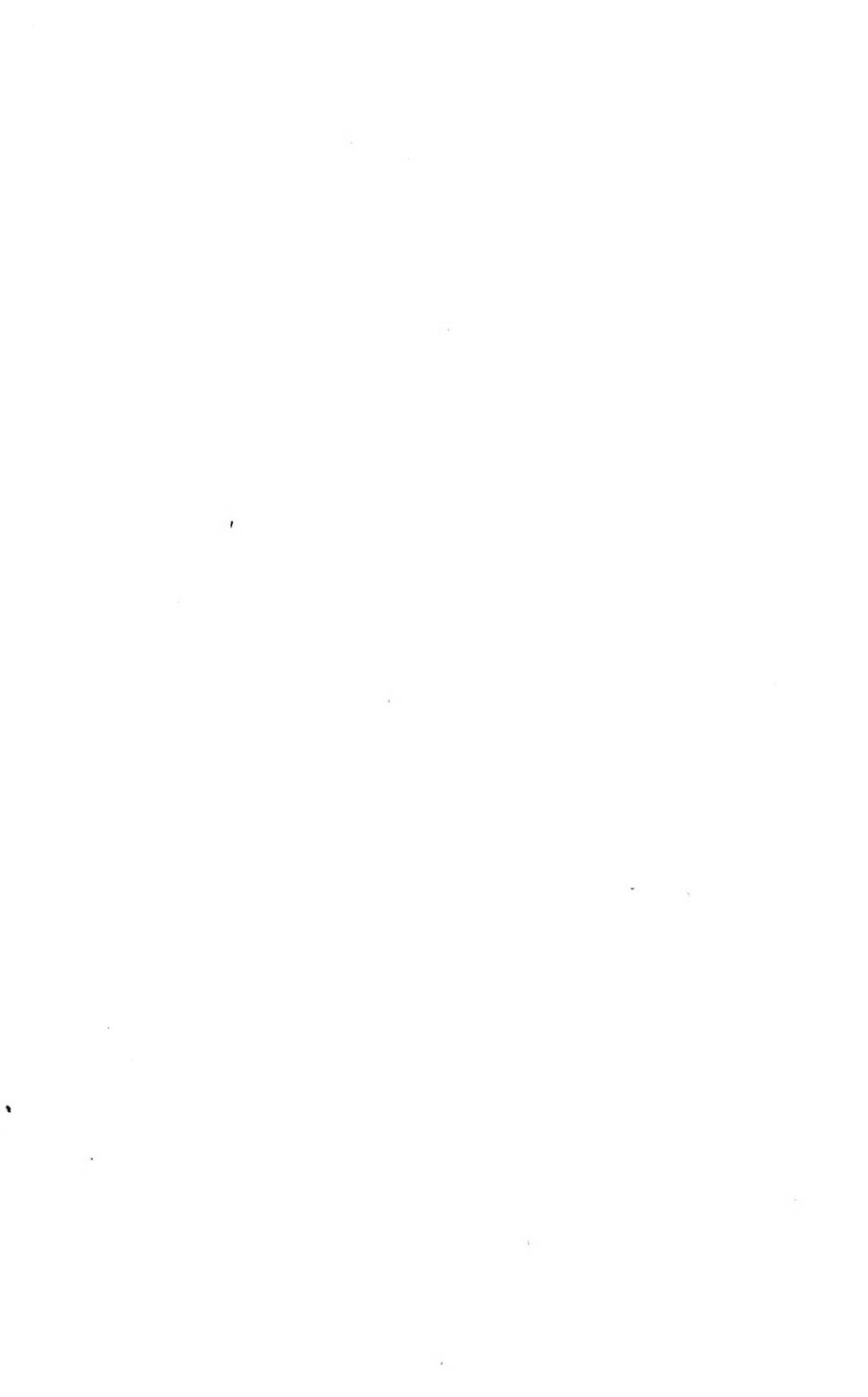
JUVENAL.

Who can behold religious liberty curtailed, and remain so insensible to the danger of being bereaved of the inestimable blessing as not to defend and enlarge it.

ANON.

A M E R I C A:

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R E M A R K S

o n

Some Passages in the Fourth Volume

o f

Dr. BLACKSTONE'S Commentaries on
the Laws of England, &c.

AT the time that I was engaged in writing on the subject of *church-authority*, in answer to Dr. Balguy, I was informed that a paragraph or two in the last volume of Dr. Blackstone's Commentaries, which was just then published, deserved the notice of Dissenters. Accordingly I procured the book, and found the passages referred to, contained the most injurious reflections on that part of the community to which I belong; but as they are altogether destitute of candour, so they are unsupported by truth, or even a decent appearance of argument, I own that I have been the more ready to animadvert upon this writer, lest, (as he is supposed to possess the confidence of the present ministry) his sentiments should be considered

considered as a notification to Dissenters, in what light they are regarded by those who are in power; and it should be imagined, that some design is formed to establish a system of civil and ecclesiastical tyranny; but when my readers see how groundless are all his insinuations to our prejudice, and how exceeding futile are the arguments he produces in favour of the obsolete statutes against the Dissenters, I am persuaded they will ask for no other proof, of there being no intention, in any set of men, who are in their senses, to revive and enforce them.

THE manner in which Dr. Blackstone has treated the Dissenters, is such as I should not have expected from a person of a liberal education, who has gained a considerable share of reputation as a writer, and who being so perfectly skilled in the *laws* of his country, should have been better acquainted with the *inhabitants* of it. Having done justice to the former, in his truly admirable Commentaries, he should not have traduced the latter, and have insulted his fellow citizens, who respect his abilities, and never gave him any provocation.

BESIDES, this writer's good sense should have informed him, that, in the present situation of public affairs, it is peculiarly unseasonable to irritate and disunite the subjects of this realm. It is now particularly requisite, that every thing should be said and done, that may tend to make all the different classes and denominations of people think well of one another; that, laying aside all illiberal and party prejudices, we may unite together for the public good. But I am sorry that I cannot help considering Dr. Blackstone as a man, who, finding a house already in flames, either wantonly or wickedly, throws another faggot into it.

S E C T I O N . I.

N vindication of the statutes of Edward VI. and Queen Elizabeth (statutes which nothing can even account for, but the grossest ignorance of the nature and purposes of the christian institution, of the natural rights of mankind, and of the proper object of civil society and government ; together with the most pitiable bigotry, and the most violent party rage) statutes, which enact, that *if any person whatsoever shall speak any thing in derogation, depraving or despising of the book of common-prayer, he shall forfeit, for the third offence, all his goods and chattles, and suffer imprisonment for life* ; he says, p. 50. " These penalties were framed in the " infancy of our present establishment, when the disciples of " Rome and Geneva united in inveighing, with the utmost bitterness, against the English liturgy: and the terror of these " laws proved a principal means, under providence, of preserving the purity, as well as decency of our national worship. " Nor can their continuance to this time be doomed too severe " and intolerant, when we consider, that they are levelled at an " offence, to which men cannot, now be prompted, by any laudable motive, not even by a mistaken zeal for reformation ; " since from political reasons, sufficiently hinted at in a former " volume (see vol. i. p. 98.) it would now be extremely unadvisable to make any alterations in the service of the church ; " unless it could be shewn that some manifest impiety or shocking absurdity would follow from continuing it in its present " form. And therefore the virulent declamations of peevish or " opinionated men, on topicks so often refuted, and of which the " preface to the liturgy is itself, a perpetual refutation, can be " calculated for no other purpose, than merely to disturb the " consciences, and poison the minds of the people."

I ALMOST suspect that this passage is borrowed from some old Thirtieth of January sermon. It would certainly suit such a place far better than a grave dispassionate treatise on the laws of England. There is one circumstance, however, that looks more like the *lawyer* than the *divine*. A mere divine would hardly have been so far off his guard, as to give so plain a hint of the weakness of the *reasons* and *arguments* in support of the church of England, as Dr. Blackstone has, unawares, done, in saying, that it has been *the terror of penal laws* that has proved the *principal means* of preserving the purity, as well as decency of the national worship.

ADMITTING, what is far from being true, that, for political reasons, it were extremely unadviseable to make any alteration in the service of the church; and admitting, also, what is as far from the truth, that there is no manifest impiety or shocking absurdity in the present forms of the church of England; why may I not speak in *derogation* of the book of common-prayer, or even in *contempt* of it, if I really think it a *defective*, and *contemptible* performance? Where is the great crime if, insulted as the Dissenters have always been, with the malice, and nonsense of high churchmen, they should, now and then, speak, or even write in their own vindication: if it were only to convince those who have been deluded by the lies and the sophistry of their adversaries, that Dissenters are men like themselves, with hands, heads, and understandings like other men; and that they have no tails, or cloven feet; a notion which some well-meaning people have been almost made to believe? And how is it possible to vindicate our conduct as Dissenters, that is, our not using the common-prayer book, without speaking in *derogation* of it. If the motive be not *laudable*, it is surely *innocent* and *pardonable*, which is quite sufficient for our vindication.

Semper ergo auditor tantum, nunquamne reponam, Vexatus toties—

JUVENAL.

WITHOUT

WITHOUT troubling ourselves about the established church (though it be our indispensable duty to endeavour to enlighten the minds of all men, as far as we have opportunity) we must, now and then, be allowed to write something in order to confirm the wavering of our own persuasion, especially considering that all the influence of this world bears against us; so that, with every advantage of argument, our interest rather loses ground; and what can we say, that is better adapted to persuade Dissenters to continue in their present situation, than to shew them how much worse they would be by the change? It is not denied, that the laws permit us to *write*. Is it not hard, then, not to be allowed to write in our best manner, and make use of our best arguments? To me this appears to be a duty of indispensable obligation, on a person who has the cause of religion at heart, and is desirous of preserving it free from the corruptions that have been elsewhere introduced into it; and yet for this discharge of my duty, I must forfeit all my goods and chattels, and even be imprisoned for life, and this cool lawyer will stand by, and deem the sentence *not too severe* and *intolerant*; because, according to his casuistry, forsooth, it is impossible my motive should be a *laudable* one. But will this author seriously maintain, that confiscation of goods and imprisoned for life, is not too severe a punishment for all actions, the motives of which are merely *not laudable*? Doth this writer himself do nothing but what is, strictly speaking, meritorious and worthy of praise? Doth he never wash his hands, change his clothes, or pare his nails?

CONSCIENTIOUS, however, as I think myself in what I do, and satisfied as I am, that my motives in writing in defence of the dissenting interest, if not *laudable*, are *just* and *reasonable*, this author insists upon it, that such writings as mine can be calculated for no other purpose, than merely *to distract the consciences, and poison the minds of the people*. If this be not *the virulent declamation of a peevish and opinionated man*, I do not know what is. It does not seem to be in the power of words to give a clearer indication of it. That any man should ever *mean* nothing (and if this be not the sense

of the word *calculated*, it has no meaning at all, that is in the least degree to this purpose in this place) but to disturb the consciences and poison the minds of his fellow creatures, I trust I shall always think so well of my species, and of its author, as to deem impossible. I even question whether the most depraved of all beings be capable of doing evil *for it's own sake*. The paragraph I am animadverting upon, is calculated to do as much mischief as most things I have ever read, tending to inflame the animosity of a party, and to increase our unhappy divisions; but I charitably think this author *meant* something else, though his passions have sadly bewildered his judgment.

As this writer has no objection to making *alterations* in the new editions of his works, I will beg leave to suggest an emendation of this strange paragraph; and propose that, instead of the *virulent declamations* of *peevish and opinionated men*, he would write *the calm reasonings of sober and conscientious men* (and I hope he is not so much a churchman, as not to allow, that some Dissenters, though perhaps not myself, may be conscientious and calm in discussing matters of religion) and then it will be no difficult step to advance in his argument, if he suppose, that calm and conscientious men may have a *true zeal* for reforming what appears to them, a corrupt religion; and the next, and final step in this argument is still more easy, namely, that a conscientious man, influenced by true zeal, is justified before God and his own conscience (which is all that he is solicitous about) if he do *depart* from what he thinks to be a corrupt mode of religion, in order to bring about a reformation of it, notwithstanding every *political* reason that may be alledged to the contrary. Those who have the cause of religion at heart, and are chiefly influenced by a regard to a *future world*, are not very apt to enter into political reasons, and considerations by which they may please men.

LET us see, however, if it be only to satisfy our curiosity, what are those deep *political reasons*, that render it so extremely

unad-

unadviseable to make any alteration in the church of England, or its liturgy ; and for this purpose let us follow our author's reference to vol. 1. p. 98. of this elaborate work, in which we are informed that we shall find them *sufficiently intimated*.

HERE let my reader stop, and cover with his hand what immediately follows, and if I were to adopt the style of my country, I might lay him a very unequal wager, that he would not in many times, guess what this great reason is. I say *reason*, in the singular number, for in the place referred to, I find only *one* mentioned, though I was led to expect *more*. It here follows :

“ A N alteration in the constitution or liturgy of the church of
 “ England would be an infringement of the fundamental and
 “ essential conditions” Of what? “ of the union betwixt Eng-
 “ land and Scotland, and would greatly endanger that union.”

I REALLY have not read the *Free and candid disquisitions*, but I am pretty confident, that this of Dr. Blackstone's is an objection to their proposed emendations of the liturgy, that never once occurred to any of them. But they ought to have had a *lawyer* among them. There is nothing like uniting the two professions of Law and Divinity ; and the one is very defective without the other.

I THINK, indeed, the reasoning of this author himself, and of the bishop of Gloucester, whom he quotes in a note upon this curious passage (added in the second edition of this work) might have allayed his fears from such an infringement of the union as this. “ For” he says, “ it may justly be doubted, whether an infringement of the fundamental and necessary conditions of the union (though a manifest breach of good faith, unless done upon the most pressing necessity) would consequentially dissolve it. For the bare idea of a state, without a power, somewhere vested, to alter every part of its laws, is the height of political absurdity. The truth seems to be, that as such an incor-

" *porate union* (which is well distinguished by a very learned pre-
" late from a *fæderate alliance*, where such an infringement
" would certainly rescind the compact) the two contracting states
" are totally annihilated, without any power of revival ; and a
" third arises from their conjunction, in which all the rights
" of sovereignty, and particularly that of legislation, must of ne-
" cessity reside. (See Dr. Warburton's Alliance, p. 195.) But
" the imprudent exertion of this right would probably raise a
" very alarming ferment in the minds of individuals ; and there-
" fore, it is hinted above, that such an attempt might endan-
" ger (though not certainly destroy) the union."

THOUGH I am of opinion that both these learned Doctors argue very weakly, and upon principles by which they might quibble away all the natural rights of man, when once he is entered into society ; it will serve my purpose, as an argument *ad hominem*. It seems, then, that the *right* to make alterations in the liturgy is allowed, and all that is necessary to be observed is *prudence* in the use of it ; and this, I doubt not, will be applied, whenever the reformation of the church is undertaken.

THE articles of the union do seem to confirm the different establishments of England and Scotland, as they then stood ; but a man must be strangely wrong-headed, not to perceive, that this was only intended to bar all incroachments of the one upon the other. It could never be understood that the two nations meant to take that opportunity of binding themselves from making any improvements in their respective religious constitutions, if they themselves, separately taken, should think proper. The supposition is absurd. Should the Scotch nation, in some future time, (and who knows what the revolutions of time and the operations of political men and measures may bring about) become desirous to adopt the English hierarchy and liturgy, would Dr. Blackstone, seriously object either in parliament, or at the bar, this article of the union against so glorious an improvement of the kirk ? Or would he really think it an infringement

ment of the union? Suppose the church of England should be reformed by an act of the English parliament, is it likely that such a measure would raise any *alarming ferment* in the minds of the Scots? Would they think themselves injured, and complain of a breach of the articles of the union? If they *should* object, would they not be thought very unreasonable, and to pervert the plain meaning of the articles? Certainly the Scots think themselves at liberty to improve their church discipline, or mode of worship, without consulting us, and therefore could not take umbrage at the English doing the same for themselves.

THIS is one, among a number of instances, in which a regard to the punctilio's of law (in minds whose sphere of comprehension has been narrowed by an attention to such minute objects) gets the better of the plainest dictates of common sense. Suppose this happy union had taken place before the reformation, and the Scots had been Mahometans at that time; a person of Dr. Blackstone's principles would certainly have opposed the present establishment of the church of England upon maxims of law; and would have challenged any christian missionaries, who should have thought of going into Scotland, with the articles of the union betwixt the two nations.

BUT, with such men as Dr. Blackstone and Dr. Warburton, religion must be governed by the maxims of civil policy; and I am sorry to observe, even for the honour of the church of England, that, according to their new principles of church-authority, (which would have been disavowed by the founders of it) the mode of vindication, which her champions have lately chosen, seems to arise, not out of her proper foundation, *christianity*, but out of those abutments which the policy of men have erected for her support; by means whereof she hath contracted not only an *alliance* with, but a striking *resemblance* of the kingdoms of this world. What effects this new measure may produce on the minds of unbelievers, or of her own serious and considerate sons,

I pretend

I pretend not to pronounce: only this I know, that it by no means serves to promote a veneration for her in the minds of thoughtful Dissenters; who, whatever others may do, consider themselves as subjected, in all matters of religion, to an authority much superior to human; obliged by laws which will support themselves without human aid or alliance, and remain in force when the laws of England, and all the commentaries on them, will have no more than an historical existence; and therefore think themselves bound by the duty they owe to their master and lord, Christ Jesus, to observe carefully both parts of that injunction he delivered to them, and to protest earnestly against the attempts of political men to confound and thereby subvert it: *Render unto Cæsar the things that are Cæsar's, and unto God the things that are God's.*

THIS writer speaks in a very contemptuous manner of the *virulent declamations of peevish and opinionated men, on topicks that have been often refuted*; and, as he may not be a logician, we must give him a little indulgence with respect to the strict meaning of his terms, and suppose that by the refutation of *topicks*, he means, by a metonymy, the refutation of *arguments* on those topicks; also, as he does not professedly enter into these topicks, he is at liberty to say any thing he pleases about them, and in as dogmatical a manner as he thinks proper; but as he mentions the *preface to the liturgy*, as being itself, a perpetual refutation of our topicks (that is, of our arguments) I was induced to make some inquiry about that preface (for, my own copy of the common-prayer book wanting it, I really did not know before, that there was any such thing in being) but I own that, after repeated perusals of it, I cannot fix upon any one paragraph, or sentence, in that preface, that I can imagine to have been intended to be a refutation of any thing; nor can I conjecture what it is this author meant by mentioning it in this light. If this preface was originally intended to be a standing refutation of the reasonings of Dissenters; it is pity that the authors were not a little more explicit, and that care should not have been taken to have it pre-fixed

fixed to every copy ; for it is impossible to say what this book may have suffered by going so frequently, and so presumptuously without its intended guard. This preface appears to me to be, upon the whole, a decent and modest composition, recommending improvements rather than discouraging them ; and, together with a deal of good sense, contains a little of the asperity and peevishness that favour of the times in which it was written ; without which, indeed, it is even yet impossible for high churchmen to speak of, or even allude to Dissenters ; and which (that they may seem not to be the aggressors) they are generally very ready to ascribe to the Dissenters.

SECTION

SECTION II.

THE comparison which this author draws between the principles and practices of the Papists and Dissenters, and his observations on the laws of England, concerning them, are not a little remarkable. "Both Papists and Protestant Dissenters," he says, p. 52. "were supposed to be equally schismatics in de-
"parting from the national church; with this difference, that
"the Papists divide from us upon material, though erroneous
"reasons, but many of the Dissenters upon matters of indiffer-
"ence, or in other words, upon no reason at all. The tenets
"of the Papists are, undoubtedly, calculated for the introduc-
"tion of all slavery, both civil and religious, but it may with jus-
"tice be questioned, whether the spirit, the doctrine, and the
"practices of the sectaries, are better calculated to make men
"good subjects. One thing is obvious to observe, that these
"have once within the compass of the last century, effected the
"ruin of our church and monarchy;* which the Papists have
"attempted indeed, but have never yet been able to execute."

WOULD not any person, unacquainted with the history of christianity, imagine, from reading this paragraph, that the church of England was the oldest christian church in the world; and that, in some remote period of time, both the Papists and Dissenters broke off from it? Would he not also imagine, from what this author says of *the disciples of Rome and Geneva having united, with the utmost bitterness, in inveighing against the English liturgy*, that the Papists and Dissenters were very good friends, and had entered into a brotherly league to distress their common enemy?

* It is observable, that the writer is careful to mention the *church* before the *king*, a circumstance which strengthens my suspicion of these paragraphs of his work being extracts from some Thirtieth of January sermons.

enemy? What misrepresentations will bigotry stick at, in order to favour her malignant purposes, purposes to which historical truth will not be subservient. Calumnies and insinuations, so palpably false and malicious as these, need no refutation. I think however, the Papists ought to wait upon Dr. Blackstone, with their most respectful compliments, for the tenderness with which he has treated them; but he has not used the Dissenters as *so much their brethren*, that they can join with the Papists upon this occasion.

T H E Papists, he says, *divide from us upon material, tho' erroneous reasons, but many of the Dissenters upon matters of indifference, or in other words, upon no reason at all.* Very cavalierly, and very wittily spoken, for a man of your gravity, Dr. Blackstone, but *gratis dictum* all. Who those Dissenters that you refer to are, you have not been pleased to distinguish; but as you do not say that they have *all* been so absurd and unreasonable, as to divide from the church of England *upon no reason at all*, you leave room to suppose, that there are *some* Dissenters who differ from the church of England upon material, though erroneous reasons, as well as the Papists? and therefore that their separation is equally justifiable. For my own part, I think that *one* of my reasons against the church of England, is as strong as any that the English reformers ever had, or pretended to have, against the church of Rome*. And there are no Dissenters that I have ever heard or read of,

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but

* I do not recollect what the first reformers could object against the system of popery, as more contrary to true religion and common sense, than the *idolatrous service of the Mass*. And I cannot help considering the established church of England, the established church of Scotland, and every other established church in the world to be *idolatrous also*, in which supreme worship is paid to any other than the *one God and father of all*, even the *God and father of our Lord Jesus Christ*. Let it be observed, however, that I am far from considering those persons as guilty of the *sin* of idolatry, who really think that the Athanasian doctrine of the trinity is consistent with the belief of the divine unity; that I am still farther from thinking, that because all christian establishments agree in this great error, that they are therefore equal in all other respects; and farthest

but alledge this objection to the church of England, that she usurps a power in the church of Christ, which its only master has not invested in any man or body of men upon earth, viz. a power of making that necessary to christian communion which he has left indifferent; and also of deciding concerning articles of faith, for, in the twentieth of the thirty-nine articles, she not only claims a power to decree rites and ceremonies, but also authority in matters of faith. But this Dr. Blackstone thinks to be *no reason at all*. For the future, I would advise him to leave this business of religious controversy to his friend Dr. Warburton, whose *Alliance* he quotes with so much respect, and who is much more dexterous in the management of these things than himself.

FROM the latter part of the paragraph I last quoted, one would think that Dr. Blackstone had been so intent upon the study of the *laws*, that he had given but little attention to the *history* of England; for every article of this account is notoriously false from beginning to end. This writer has, indeed, given proofs of a minute acquaintance with *some parts* of the history of England, particularly in his excellent *Law Tracts*. It is, therefore, possible, that he may have just ideas of this part of the history; but I choose to ascribe his mistakes to want of knowledge, because it is the most favourable construction I can put upon them. The naked facts are these.

THE family of the Stuarts, worthy members of the church of England, but having an unfortunate bias on the side of popery*, uniformly

farthest of all am I from thinking, that *involuntary errors*, of any kind, will be imputed to any set of men whatever, and that the favour of Almighty God will be denied even to Papists, Mahometans, or Heathens, as such. May I relinquish every thing most dear to me, rather than give up this great foundation of *universal charity*.

* James I. however, was so zealous a presbyterian, originally, that he used to call the English liturgy *an ill said Mass*; and had no opinion of bishops till he found how convenient they were to his system of arbitrary power.

uniformly asserted an absolute power, and made repeated attempts to enslave this nation. The essays of James I. in this favourite road, were undisguised, but foolish and impotent. Those of his son Charles I. aided by the deepest hypocrisy, were bold but rash and unsuccessful. The *nation*, not the Dissenters only, asserted their natural and civil rights. They bravely opposed force to force, justice to injustice, and at length prevailed.

HAD the king, supported by all the high-churchmen and Papists, prevailed, no man can say that the civil constitution of this kingdom would not have been entirely overturned, and an absolute despotism have taken place, at least as much of it as has taken place in France or Spain; that is, as much as the spirit of the people of Europe can possibly bear. I also appeal to any intelligent and moderate churchman, whether, if the schemes of Laud had been put in execution (and he had, in every thing, the concurrence of the court) the ecclesiastical constitution of this country would not have been changed too, in favour of something much nearer the gross, abject, and impious superstition of the church of Rome.

AFTER the termination of the war, the greatest part of those who before had been Dissenters were still friends to monarchy: and, together with them who began the opposition, would have spared their sovereign (who, if he had had a thousand lives had

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forfeited

I am at a loss to know what this writer means by saying, p. 429. "On the accession of King James I. no new degree of "royal power was added to, or "exercised by him." Rapin says, "It is certain that James's chief care after his accession, was to maintain the prerogative royal in its utmost extent, "nay to carry it higher than any of his predecessors. He must, at the time I "am now speaking of, have conceived a larger notion, than had been hitherto "formed, of the power of an English King; since when he came to Newark, "he ordered a cut purse to be hanged by his sole warrant, and without trial. "It cannot be denied, that this was beyond the lawful power of a king of England, and contrary to the privileges of the English nation." Perhaps Dr. Blackstone may not have read Rapin, or may think him an historian of no credit.

forfeited them all to the justice of his injured country, and whose memory nothing but a violent death could have saved from general execration) but the leaders of the *army*, which will necessarily give law to the state in all convulsions of this nature, happened to be independents and republicans; and though they had but few adherents out of the army, they could not be prevented from cutting off the king.

THE death of the king, and the subversion of the monarchy, were not the effect of any *religious* principles of the *Diffenters*, as such. Had the army consisted of Mahometans, the event would have been the same; and if none of their commanders had had power enough to usurp the empire immediately, something like a republic would have been formed by them.

AFTER this event, the independents made no proper establishment in religion. The *Presbyterians*, indeed, would have made a most intolerant one, similar to that of the church of England in those days, but they were happily over-ruled; and, the friends of the lately established church would have dwindled into one of the most inconsiderable facts, had not the hierarchy been restored with Charles II.

THIS prince was first a concealed, and then an avowed Papist; always an admirer, and generally, a pensioner of France. His uniform aim was to establish Popery and arbitrary power in this kingdom; and his brother and successor James II. (always an avowed Papist, and a Jesuit too) had very nearly succeeded in both these detestable schemes; when divine providence raised up for our deliverance, king William III. of glorious and immortal memory.

THIS excellent prince to whom, under God, we owe all our liberties, was a *Presbyterian*, and he found all of that name, and the *Diffenters* in general, his best friends in this island. The fame

fame have the princes of the house of Hanover* always found them. Very few Scotch Presbyterians, who were not subject to the slavery of the late hereditable jurisdictions, and not one English Dissenter of any denomination, that I ever heard of, were in either of the two rebellions†; but numbers of Papists and high-churchmen (who, at that time, were generally Tories and Jacobites) were engaged in both. And I appeal to all persons who know the Dissenters (for as to Dr. Blackstone, it is plain he knows no more about them, than he does about the Patagonians, or the inhabitants of the Solomon isles) whether they be not, almost *to a man* (I may add, *woman* and *child* too) the firm and intrepid friends of the liberties of this country, and of its constitution, as a *monarchy*; notwithstanding the *republican principles*, with which we are generally and ignorantly charged.

THIS writer has also given a very false account of what he is pleased to call *the rebellion*, and of the consequences of it in the reign of Charles I. in the last chapter of this work, which I shall, therefore, briefly animadvert, or *comment* upon in this place. After enumerating the grievances of those times, he owns that the king had behaved in such a manner, that “there were “ grounds most amply sufficient for seeking redress in a legal “ constitutional way;” and, consequently, as I should think, in any

* The princes of this family were *Lutherans*, as is the family of our present Queen (to whom Dr. Blackstone is Solicitor) and it is well known, that this mode of the Protestant religion is so unlike that of the church of England, and so like that of the Presbyterians; that the members of our established church will not admit the validity of ordination in either of them; whereas they admit, without scruple, those who are ordained in the church of Rome. As to the members of the *reformed* church in Holland, they are as much the disciples of Geneva as any Dissenters in England.

† In the rebellion of 1715, Mr. Wood, the dissenting minister at Chowbent in Lancashire, at the head of his congregation, joined the king’s forces, and, under the commander in chief, defended the bridge at the battle of Preston. In consequence of which he was, as long as he lived, and is to this day, always mentioned by the name of *General Wood*.

any other way, if it could not be obtained in what is here called a *legal* one; as was presently found to be the case. " This redress, when sought, was also constitutionally given." I should rather say it was extorted, and never intended to be acquiesced in. Dr. Blackstone owns that it was not done " with so good a grace, as to conciliate the confidence of the people." Indeed, upon this, and several other occasions, we seem to have *the same ideas*, though we chuse to express them in a different manner. So two painters might chuse to lay different colours on the same drawing.

" UNFORTUNATELY, either by his own mismanagement, or " by the arts of his enemies, the king had lost the reputation " of sincerity, which is the greatest unhappiness that can befall a " prince." A great misfortune and unhappiness truly! But I hope the *piety* of this prince was equal to his trials, and I doubt not he bore the *affliction* with proper resignation, as the *act of God*.

" THOUGH he had formerly strained his prerogative, not only " beyond what the genius of the present times would bear, but " also, beyond the examples of former ages, he had now consent- " ed to reduce it to a lower ebb than was consistent with monar- " chical government. A conduct so opposite to his temper and " principles, joined with some rash actions, and unguarded ex- " pressions, made the people suspect that this condescension was " merely temporary." If the case was as Dr. Blackstone here represents it, who can wonder that they entertained those suspi- cions; unless it be asserted that the word of a king, though it have been prostituted in the most shameless manner, ought to be received without the least mistrust by any subject if it be *publickly* given; notwithstanding it be contradicted, not only by other ex- pressions, spoken to his friends, when he was off his guard (such as are generally allowed to be most to be depended upon in deter- mining a man's real intentions) but also by *actions*. Dr. Blackstone, I suppose, would have been that *good subject*. I should not have had so much faith, or loyalty.

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“ FLUSHED therefore, with the success they had gained, “ fired with resentment for past oppressions, and dreading the “ consequences if the king should regain his power, the popular “ leaders (who in all ages have called themselves the people) “ began to grow insolent and ungovernable.” At this time the popular leaders, most certainly, spake the sentiments, and were actuated by the spirit of the people in general (or else, according to this writer’s own representation of their grievances, they must have had no spirit at all) and if they did *begin to grow insolent and ungovernable*, it was because they perceived that the king, notwithstanding all his pretended concessions, was actually preparing to levy war against his people, and therefore they were obliged to stand upon their defence. “ Their insolence rendered them desperate,” and the king, finding that the people would be cajoled no longer, grew desperate too. Speaking of the same popular leaders, he goes on, “ and joining with a set of “ military hypocrites, and enthusiasts” (though but children in hypocrisy, compared with the king and his ministers) “ they “ overturned the church and monarchy; and proceeded, with “ deliberate solemnity, to the trial and murder of their sovereign.”

ACCORDING to this writer, then, all these horrid acts were committed by the *same popular leaders* who first opposed the king. It is also naturally inferred, from the turn of his sentence, that these popular leaders joined the military hypocrites and enthusiasts, *with a view* to the perpetration of this murder. That there is not the least colour of truth in the assertion, or the insinuation, I appeal to any thing that was ever called *a history of England*. I will even rest it upon the evidence of Carte, Guthrie, Hume, or any other Jacobite historian this writer shall name.

WHAT would the glorious Hampden, Pym, and many others, who figured at the opening of the long parliament (men whose names will be immortal, so long as the principles of integrity,

grity, a love of liberty, or even loyalty, shall be held in esteem) say were they to hear such a relation as Dr. Blackstone hath given of their views and conduct. They would certainly conclude, that all the authentic memorials, of their time, were perished; and could have no idea of any man's having the assurance to give so palpably false and injurious an account of those transactions, within little more than a century after they happened; when there was such a redundancy of evidence, that it was easy for any man of common sense and honesty, to come at the truth of the facts.

MR. HUME, whose evidence may well be allowed in this case, has given a very different account of these heroes. He also acknowledges, that whatever civil liberty we now enjoy in Great-Britain, is owing to our ancestors, the Puritans; and I trust that every wise and virtuous ministry, who have the liberties and natural rights of their fellow citizens at heart, will always have reason to depend upon the Dissenters; and that only a wicked, tyrannical, and profligate administration, who are intent upon making a tool of the king, and thereby grasping all the power of the state to themselves, will ever entertain any jealousy of them. A wise, just, and moderate prince will value such subjects; though a prince of different character, may rather chuse to be without them.

IF the spirit and the doctrines of the sectaries in England are not calculated to make men good subjects, I think it is incumbent upon this writer to prove his assertion by the history of other *disciples of Geneva*. Since the principle is the same, its influence may be expected to be uniform. Do the Protestant cantons of Switzerland, in the neighbourhood of this Geneva, contain no good subjects? As to Geneva itself, the source of all this mischief, it can be nothing else than a den of lawless banditti. Are the French protestants universally bad subjects? Are the Protestants in Holland bad subjects? Or, to come nearer home, will this gentleman say that the Presbyterians in Scotland are bad subjects;

subjects; if these *disciples of Geneva* had not given recent and ample proofs of their loyalty, to the entire satisfaction of the most obsequious courtier, they have taken a great deal of pains to very little purpose, and I shall be at a loss to know what test of loyalty will be deemed sufficient. However, let any other be proposed. Every fair test should be required, and refused, before this universal charge against the disciples of Geneva can be fully admitted.

I CANNOT say that I have ever heard of any material difference between the principles of the Lutherans, and those of the disciples of Geneva (or, as they are called abroad, *the reformed churches*) with respect to their political influence. If, therefore, Dr. Blackstone's charge against the disciples of Geneva be just, I should not expect that the disciples of Luther were entirely innocent; but I do not recollect any thing in the history of Germany, Prussia, Sweden, Denmark, or Norway, that is favourable to this hypothesis. The truth is, that Protestants, of every denomination, have proved disaffected, and sometimes rebellious, when they have been oppressed; but this resistance to government is not to be ascribed to the spirit of their *religion*, but to their spirit as *men*. So great is this writer's antipathy to us, deluded and desperate sectaries, and so much doth the horror he conceives for our opinions engross his thoughts, that the most natural and common actions of our lives will, I suppose, be ascribed by him to our peculiar principles. I shall hardly be able to eat to satisfy my hunger, even though it be not in Lent, but he will fancy it to be a gratification of a schismatical appetite.

HOWEVER, I am far from denying that religious principles have influence upon mankind as members of civil society, tho' I should not ascribe so much to them as Dr. Blackstone, in the violence of party rage, is disposed to do; but, according to my idea, of *good subjects*, the tendency of the religious principles of the Dissenters in England is to make men truly such. If, indeed,

by *good subjects* this author means *subjects of despotism*, I agree with him, that the spirit, the doctrines, and the practice of these sectaries are not extremely well calculated to make men good subjects. I am apprehensive that these sectaries would prove a little untractable in such a situation. But, for that very reason, in a *free, and equal government*, a government which leaves men a reasonable share of their natural rights, such men are, of all others, the best subjects. They find themselves at ease in such a state, and will, therefore, endeavour to make others easy in it. In this light, the Dissenters regard the constitution of Great Britain. There are no subjects of the realm who are, from principle and interest, more attached to their king and country than they are, and every insinuation to the contrary is malicious and absurd.

IF Dr. Blackstone wants a doctrine calculated to make men good subjects *on any terms*, I would refer him to the *universal maxim* I have animadverted on in Dr. Balguy (in which he says, the scriptures are clear and explicit) viz. that *authority, once established, must be obeyed*. I preach no such doctrine.

As to the *church*, that is, the established church of England, God knows we cannot, without hypocrisy, pretend to be very *cordial friends* to her, because it is well known, she has not been the best, or tenderest of mothers to us. But notwithstanding this, we are far from being such *deadly enemies* to her as Dr. Blackstone seems to imagine. We can *smile* among ourselves at some things that appear rather strange and whimsical in her; but truly, we are very little disposed to molest her; and upon the whole, we think, that we bear with her *infirmities*, full as well as could be expected, all things considered.

I CANNOT help thinking, that the regret which this author feels for the subversion of *such a church and such a monarchy* as were subverted within the compass of the last century, is so extreme, that he charges it indiscriminately, upon all who were present at the transaction; though many of them were

were so far from being aiders and abettors in it, that they did all they could to prevent it. Thus a tender mother, seeing her beloved child get a dangerous fall, beats even the ground it fell upon.

DR. BLACKSTONE seems to think the present laws of England bear too hard upon the Papists, and I agree with him in it. I think that that antichristian power seems to be in its old age; that her malice is now impotent; and, since nothing but self-defence will justify hostilities, that in this case, persecution would be an *unnecessary evil*. Besides, it is cowardly to kick an old and dying lion. But why should not this good Doctor think the Dissenters entitled to as much indulgence, and that some of our laws, not yet formally repealed, bear rather too hard upon us? We think we are, at least, as gentle, as inoffensive, and as well disposed as the Papists; and we doubt not that all who are reasonable, generous, and liberal minded, and all who are acquainted with us, will think so too.

IT is evident that we have no *foreign head*, to whom we swear allegiance, as the Papists have. Though it is not impossible but that Dr. Blackstone (knowing very little about the Dissenters) may be ignorant of this circumstance; and indeed, as he mentions *the disciples of Rome and Geneva* in the same connection, and in the same turn of phrase, he may imagine that the supreme head of *our* religion resides at Geneva, just as the supreme head of the Papists lives at Rome. And since he talks of *an union between the disciples of Rome and Geneva*, he may suppose, that these two heads of the different sects, which *divided from* the church of England, when they left this country, being upon very good terms, chose to take up their residence in the same neighbourhood; where they live together, in as friendly a manner as the two kings of Brentford.

THANKS to God, and a sensible administration (not to Dr. Blackstone) that the penal laws against the Dissenters are as ob-

folete as those against the Papists, nor will any friend of religion, or of his country, attempt to revive them. Indeed, I cannot help thinking, there would be some difficulty in enforcing one of our admirable statutes to prevent heretical opinions, quoted with approbation by this author, p. 50. It is that of William III. against those " who either deny any one of the persons of the Holy Trinity to be God, or maintain that there are more gods than one." If I have any ideas to these words, this statute condemns all mankind: for every man must hold one opinion or the other, since the one affirms, and the other denies the very same thing.

S E C T I O N

SECTION. III.

DR. BLACKSTONE, I doubt not, will deem some parts of my answer to his invective to be *a reviling of the ordinances of the church*, which, he says, p. 50. *is a crime of a much grosser nature than mere non-conformity.* By the way, I did not know that mere non-conformity was any *crime* at all in the laws of England (whatever it may be in his Commentaries on them) since the act of Toleration. It is certain there is no *penalty* annexed to it; but with Dr. Blackstone, who can both make and aggravate crimes, according to his own convenience, mere non-conformity it seems, is not only a *crime*, but a *crime of a gross nature*, though reviling the ordinances of the church be a *crime of a grosser nature*.

THE reasons this author gives for considering this latter offence as more aggravated than the former, are worth our notice. "Reviling the ordinances of the church," p. 50. "is a crime of a much grosser nature than mere non-conformity, since it carries with it the utmost indecency, arrogance and ingratitude; indecency, by setting up private judgment in opposition to the public; arrogance, by treating with contempt and rudeness that which has, at least, a better chance to be right than the singular notions of any particular man; and ingratitude, by denying that indulgence and liberty of conscience to the members of the national church, which the retainers to every petty conventicle enjoy."

I AM so unhappy as not to be able to see the least connection between any of the two ideas which Dr. Blackstone here links together. If setting up private judgment in opposition to that of the public be *an indecency*, then, certainly, Wickliffe, Luther,

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Mr. Locke, and Sir Isaac Newton, were very indecent men; and yet, if history says true, the last of them, at least, was remarkably *modest*. They were, likewise, guilty of great *arrogance*, because they ought to have considered, that the prevailing opinions, which they called in question, had at least a greater chance to be right than their *singular* notions. But, well versed as Newton was in the *doctrine of chances*, he had not, it seems, attended to its use in ascertaining the truth of theological opinions. He might possibly think, with me, that, if this new standard of truth were admitted, no new opinion must ever be indulged, unless it should happen, by an extraordinary concurrence of circumstances, to jump into the heads of the greatest part of the world at the same instant of time. Nay, if this should happen, none of them must venture to publish his opinion, because he could not know but it might be a singular one. This new use of the doctrine of chances, brings to my mind a story I have heard of two school-boys, who were disputing which of them was the better scholar; when one of them proposed to determine it by the tossing up of a half-penny.

BUT to go on with this author to his last mentioned consequence of reviling public opinions, viz. the *ingratitude* of this conduct. If I had not quoted the whole paragraph relating to this subject, I might have taken another opportunity of putting my reader upon guessing, by what medium of proof this admirable logician could possibly connect his two propositions. For that a man, who reviles the opinions of another, doth thereby deny him liberty of conscience, is to me utterly incomprehensible. If my friend entertain a foolish and absurd opinion, cannot I endeavour to laugh him out of it, without denying him his *right* to hold it. Then every man that laughs is a persecutor. Besides, how do the *retainers to our petty conventicles* (as this excellent writer very elegantly, and respectfully expresses himself) enjoy any liberty of conscience at all, if it be in the power of those who *revile* them to deny it them? If this were the case, this great privilege would be lost every day, especially on a Thirteenth

tioth of January, and could never survive the publication of this fourth volume of Dr. Blackstone's Commentaries.

THIS whole paragraph is, I think, an unparalleled piece of elegance and reasoning. But *retainers to petty conventions*, must be guilty of *indecency, arrogance, and ingratitude*, and such proofs, of the charge as these of Dr. Blackstone's are easily found. Whether the water run from the lamb to the wolf, or from the wolf to the lamb, the weaker must be guilty. I wonder, indeed, that this author, whose invention is so fertile, should not have added a few more articles to this black list; since he could have found no peculiar difficulty in increasing it to a hundred, unless terms of reproach in the English language should have failed him.

I ALSO cannot help wondering, that it should never seem to have occurred to Dr. Blackstone, that every thing he has advanced about Diffenters would have come with much more propriety from the mouth of a Papist, in a remonstrance against the conduct of the first reformers. Every argument he has urged would then have had double force. If, for example, it be *indecent, arrogant, and ungrateful* in us to think differently from the church of England, which is, as it were, but a thing of yesterday; much more indecent, arrogant, and ungrateful must it have been for Wickliffe, Luther, Calvin, Cranmer, &c. to have presumed to think differently from a church so antient and venerable as that of Rome. The Papists, with far more plausibility, alledge, that the first reformers could be actuated by no *laudable motive*, and that their labours were *calculated for no other purpose, than merely to disturb the consciences and poison the minds of men*. And as to *political reasons*, for one that Dr. Blackstone can alledge in his cause the Papists might have alledged twenty.

IF the revilers of the Diffenters find themselves incommoded by their own arguments being thus retorted upon them, let them learn, for the future, to profit by the advice of our Lord, Matt.

vii. 1. *Judge not that ye be not judged; for with what judgment ye judge, ye shall be judged; and with what measure ye mete, it shall be measured to you again.*

WITH perfect coolness I now close my remarks on the offensive paragraphs I have quoted in Dr. Blackstone's Commentaries, from the value of which I am by no means disposed to detract. Every *Englishman* is under obligation to this writer, for the pains he has taken to render the laws of his country intelligible, and the *philosopher* will thank him for rendering the study of them easy and engaging: but the *man* cannot help regretting that there should be any thing *servile* or *illiberal* in a work of so much excellence; and the *christian* will weep over every symptom of groundless rancour, and unmerited abuse that occurs in it; and lament, that this teacher of *human laws*, should have imbibed so little of that candid and benevolent spirit which distinguishes *the laws of christianity*, and which should influence every person who acknowledges their obligation, whatever station in life he fills, and in whatever field he chuses to employ himself for the public good.

INSULTED as I conceive myself to have been, in the injurious representation this writer has made of the principles and practices of the Dissenters, I may, in return, have expressed my resentment of it with too much acrimony. Seeing, in a strong point of light, the weakness and folly of his censures, I may have treated them with more contempt and ridicule than a mere by-stander will altogether enter into, and consequently approve. But I hope that I have committed no offence, in either of these respects, that a truly impartial by-stander, who considers the provocation will think venial. There is no man who is not formed sensible both to affronts, and to ridicule; and it is with difficulty that an ingenuous mind, restrains the natural expressions of its real feelings. I also am a man, and claim the privilege of humanity.

IN order to make my apology to Dr. Blackstone in particular, let him suppose, if so great a misfortune can be supposed, that himself and not I, had been the sectary, and myself not he, the great lawyer and able writer; that his father and grandfather, mother and grandmother, having been Presbyterians, he had no more idea of the *crime of mere non-conformity*, than I suppose he now has of the *virtue of flagellation*, or any other voluntary penance of the church of Rome, notwithstanding the good he might receive from those wholesome severities, and notwithstanding his good inclinations to the poor flagellants:

LET him suppose, that his deluded parents had been so fatally attentive to his education (and that he had in consequence of it, so deeply imbibed the *principles*, and been so long enured to the *practices of the sectaries*,) that all his reading and thinking afterwards did but tend the more to confirm him in them; that, though he frequently went to the established church, and was much better acquainted with the method in which public worship is conducted there, than he now is with what passes in *petty conventicles*; he was, nevertheless, so absurd, as really to prefer the extemporaneous effusions of a miserable enthusiast, to the *excellent doctrines*, and *methodical composition* of the English liturgy:

LET him suppose, that though, like me, he had been particularly fond of going, with his neighbours, to the *christian service* of the Thirtieth of January, he was so far from entering into the pious design of that religious institution (the excellence of which has preserved it from corruption or abuse for more than a century) that it was rather to amuse himself upon the occasion, with seeing exemplified the prudent care of the bees, in besliming and encrusting the carcase of a mouse, or other noxious animal, the stench of which was in danger of proving offensive to them; and that though he was far from entertaining any veneration for the military *hypocrites and enthusiasts*, who conferred

the honour of martyrdom on the blessed Charles; yet, rather than pay devotion at his shrine, he would have gloried in being descended from the man, who, on the scaffold, wished to be transmitted to posterity as one *who had a hand and a heart in the death of that tyrant*:

WITH this character, and these sentiments, let him suppose that I, the great lawyer and able writer, Solicitor-general to the Queen, and in connection with the present British ministry, (whose administration is likely to make so great a figure in the future annals of this renowned country) had written his excellent *Commentaries on the Laws of England*, a work that would necessarily go into the hands of all the youth of the British nation, and could not fail to make them hate and despise the *set* to which he belonged, and to which (how unreasonably soever) he was so firmly attached: In this case, I cannot help thinking that, if he, like me, had learnt a little English of his mother, as well as a smattering of Latin and Greek at a public grammar school, he would, in order as far as in him lay, to prevent the impending mischief, or at least to show his own sense of the injury and insult, have written some such a pamphlet as this, which, with all deference and respect, I now present to the public, and to Dr. Blackstone.

L E E D S, J U L Y, 1769.

F I N I S.

A
R E P L Y
T O
Dr. PRIESTLEY'S
R E M A R K S
ON THE
FOURTH VOLUME
OF THE
C O M M E N T A R I E S
ON THE
L A W S O F E N G L A N D.

BY THE
AUTHOR OF THE COMMENTARIES.

A M E R I C A:
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PHILADELPHIA. MDCCCLXXIII.

A

R E P L Y

• T O

Dr. P R I E S T L E Y's

R E M A R K S, &c.

DR. Priestley having published, in a very angry Pamphlet, his *Remarks on some paragraphs in the fourth volume of my Commentaries*, I find myself called upon to take some notice of a performance, to which an author, of reputation in the literary world, has very fairly subscribed his name.

THE method, which I have hitherto observed, with regard to the numerous strictures which my Commentaries have excited, has been to neglect them intirely, if I thought them mistaken or trifling: But, if founded in justice, from whatever quarter they came, I have availed myself of the truths they imparted, and have endeavoured to correct my own mistakes in some subsequent impression of the book: So true is Dr. Priestley's observation*, that I have "no objection to making alterations in the new editions "of my works". For I have always thought it more honourable to retract, than to persevere in an error; and have neither

leisure

* Page 10,

leisure, inclination, nor ability, to dip myself in controversy of any kind, much less theological controversy. But I have departed this once from my usual rule, not with an intention to enter into personal altercation with Dr. *Priestley* (in which I am by no means a match for him) but principally to explain my own sentiments with respect to *religious liberty*, which that gentleman hath taken an handle very greatly to mis-represent.

BEFORE I descend to particulars, I must first of all correct a mistake, which Dr. *Priestley* seems to have fallen into*, by fancying that the offensive passages in my book were *personally* levelled at *him*: Let me assure him, that they were written above fifteen years ago, before I believe, he had ever appeared as an author: And let me add, that, till his present Remarks, I never read any of his productions, excepting his history of electricity; from whence I conceived a very favourable impression of his talents as a *candid* and *ingenious* writer. How greatly my opinion, with respect to the first of those qualities, has been altered by his late publication, I leave to himself to imagine.

HE supposes me, throughout his performance, to be a bigotted high-church-man, and of a persecuting spirit in matters of religious differences: and to support the opinion, which he has thus unaccountably taken up, he observes†, that I quote *with approbation* the statutes of king *William* against *Arians*, and strongly intimates, that I wish for a revival of the penal laws against the *Diffenters*.

TO the first charge I answer, that I have barely recited that statute, without either approving or disapproving it. To refute the second, I need only refer to the very pages‡ from whence this author has cited the Paragraph, with which he is principally displeased. The Reader will there find it laid down, “ that “ our ancestors were certainly mistaken in their plans of compulsion

* Page 9, 10, 32, &c.

† Page 28.

‡ Comm. p. 52, 53.

“ sion and intolerance:—that the sin of schism, as such, is by no
 “ means the object of temporal coercion and punishment:—that
 “ if men quarrel with the ecclesiastical establishment, the civil
 “ magistrate has nothing to do with it, unless their tenets and
 “ practice are such as threaten ruin or disturbance to the state:—
 “ that all persecution for diversity of opinions is contrary to eve-
 “ ry principle of sound policy and civil freedom:—that, in par-
 “ ticular, the laws of queen Elizabeth and king Charles II. a-
 “ gainst the Dissenters, were such as I should not undertake to
 “ justify:—and that the subsequent indulgence shewn by the
 “ toleration-act arose from a spirit of true magnanimity in the
 “ legislature.”

I HAVE indeed illustrated this doctrine with a few historical remarks to shew the motives of originally enacting those penal laws, which are now suspended by the toleration-act, and in which I have declared that our ancestors were certainly mistaken. I have deduced them from the turbulent disposition which the Dissenters had shewn *in former times*; and which I believe no moderate Dissenter will deny to have *formerly* existed among many of the separation, though perhaps he may think it was excited by the haughtiness and rigour of the churchmen. I have said, that both Papists and Protestant Dissenters *were esteemed* by the laws enacted since the reformation (not that *I at present esteem them*) *to offend* through a mistaken or perverse zeal; that they *were supposed* (not that *I suppose them*) to be equally schismatics, &c. as in the passage cited by Dr. Priestley*. And then follow these words, “ Yet certainly our ancestors were mistaken in their plans “ of compulsion and intolerance;” together with the rest of the sentiments, which I have just now quoted, and which alone were intended to be delivered as my own opinion. But Dr. Priestley hath attributed to me the adoption of those principles, which I only meant to mention historically, as the causes of the laws which I condemn.

I SHALL

I SHALL own very frankly, that (on reviewing this passage) I am convinced, that it is somewhat incorrect and confused; and might lead a willing critic to conclude, that a general reflection was intended on the spirit, the doctrines, and the practice of the body of our *modern* Dissenters. A reflection which I totally disapprove: being persuaded, that by far the greater part of those, who have now the misfortune to differ from us in their notions of ecclesiastical government and public worship, have notwithstanding a proper and decent respect for the church established by law; detest all outrageous attacks on its ministers, liturgy, and doctrines; and are zealous in supporting those two great objects of every good citizen's care, and which are not so incompatible as some persons seem to imagine, the *civil liberties* and the *peace* of their country. And so far am I from wishing to perpetuate or widen our unhappy differences, that I shall make it my care, in every subsequent edition of this volume, so to rectify the clause in question, as to render it more expressive of that meaning which I here avow; and which, if read with a due degree of candour, might before have been easily discerned.

BUT, after having made this sacrifice to the spirit of truth and moderation, I must beg leave to inform Dr. Priestley, since it seems he is yet to learn it*, that *non-conformity* is still a crime by the laws of *England*, and has heavy penalties annexed to it, notwithstanding the act of toleration (nay, expressly reserved by that act†) in all such as do not comply with the conditions thereby enjoined. In case the legislature had intended to abolish both the crime and the penalty, it would at once have repealed all the penal laws enacted against nonconformists. But it keeps them expressly in force against all Papists, oppugners of the trinity, and persons of no religion at all: and only exempts from their rigour such serious, sober minded Dissenters, as shall have taken the oaths and subscribed the declaration at the sessions, and shall regularly repair

* Page 29,

† Sect. 16.

repair to some licensed place of religious worship. But, though these statutes oblige me to consider nonconformity as a breach of the law, yet, (notwithstanding Dr. *Priestley's* strictures) I shall still continue to think, that *reviling the ordinances of the church* is a crime of a much grosser nature than the other of mere *nonconformity*.

FA R be it from me to wish any restraint to be laid on rational and dispassionate enquiries into the rectitude and propriety of our national mode of worship. What I have censured (and indeed not I, but the law) is not, as Dr. *Priestley* most unwarrantably supposes*, the *thinking differently from the church of England*;— but the *treating it with contempt and rudeness*, the *inveighing with bitterness against the English liturgy*, and the *virulent declamations of peevish or opinionated men*, in opposition to the ecclesiastical establishment. If Dr. *Priestley* is guilty of these practices, (though, whether he is so or not, I profess myself intirely ignorant, unless from his present publication) he falls within the danger of the laws; if otherwise, he is totally unconcerned in the censure.

BUT why, let me ask, does Dr. *Priestley* apply these characters, to the body of our present Dissenters? I have not applied them to any, but a few of their ancestors *in the infancy of our present establishment*, and to such modern writers of all denominations (not confining them to Protestant Dissenters) as have trodden too closely in their steps. If I were weak enough to apply them in general to the Dissenters of the present times, and if he were hardy enough to deny the indecent behaviour of some antient polemical Puritans, we should both of us offend against the truth. He will not, I am persuaded, maintain, that all protestant Dissenters are virulent declaimers against the liturgy; or that none will fall under that description but protestant Dissenters only. I have mentioned the Papists as guilty of the very same practice: I may also add the Infidels and Deists. The mentioning these opposites

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together,

together, and involving them in one and the same censure, for one and the same offence, has greatly offended Dr. *Priestley**. But, if men of better principles will be found in bad company upon such an occasion, the law makes no distinction of persons. It indulges them with full liberty of conscience in every other instance, but that of railing at the national establishment. And I should think the same practice would be equally unjustifiable, if directed against the Presbyterian church of *Scotland*, by any Episcopalian there: both churches, since the union, deriving from the law of the land an equal claim to protection and *perpetual* security.

Dr. *Priestley* seems astonished†, that I can possibly consider (as I certainly have done) any alteration in the constitution of the churches of *England* or *Scotland*, or in the liturgy of the former, as an infringement of the fundamental and essential conditions of the *British* union. If this doctrine be new to the reader as well as to Dr. *Priestley*, let me only recommend to his perusal the statute, 5 *Ann.* c. 5. which, in order “ that the doctrine, “ worship, discipline, and government of the church of *England* “ may be effectually and *unalterably* secured,” confirms and *perpetuates* all acts then in force for its establishment; particularly the acts of uniformity, of which the book of common-prayer is a part;—enjoins an oath to be taken by every sovereign at his coronation, for preserving *inviolably* the said doctrine, worship, discipline, and government;—and declares that the said act shall forever be holden and adjudged a fundamental and essential part of any treaty of union with *Scotland*, shall be inserted at length in any act of parliament, that shall ratify such treaty of union, and be therein declared an essential and fundamental part thereof. Let him consult a similar act of the *Scotch* parliament, whereby the like precautions are taken “ for securing the Presbyterian “ church-government and discipline in that kingdom, with the “ form

“ form and purity of worship presently in use within the same.” Let him then peruse the statute 5 *Ann. c. 8.* which ratifies the articles of union, and declares those two acts to be *fundamental and essential conditions* thereof. And, when he has done this, let him judge for himself, whether any alterations in the constitution or liturgy of the church of *England*, would or would not be infringements of those fundamental conditions: or whether, according to Dr. *Priestley**, the articles of union only “ seem to confirm the different establishments of *England* and *Scotland* as they then stood, with liberty to make any improvements in their respective constitutions, if they themselves *separately taken*, should think proper.” Indeed, without dissolving the union, I do not see, how the sense of either nation could now be *separately taken*; how the *Scots* peers or commoners could be prevented from voting either *for* or *against* the repeal of the acts of uniformity, in case it were moved in either house? or how, without suspending the parliament of *Great Britain*, Dr. *Priestley* would now procure “ an act of the *English* parliament, for reforming the church of *England*†.”

AND, however new or surprising my construction of this national treaty may appear to Dr. *Priestley*, it is certainly consonant to the ideas entertained by both nations at the time of the union; who imagined that they had obtained the most solemn and sacred security that human polity could possibly give, that the government and mode of worship of their respective churches should for ever remain inviolable. For which I may appeal to the testimony not only of bishop *Burnet*, the historian of those times, and a very active instrument in promoting the progress of the union, but also of the late Duke of *Argyle* and lord chancellor *Cowper*, two of the commissioners who negotiated that important treaty.

THE bishop gives the following account of the opposition that was raised in *Scotland*, by those who wished ill to that measure*. “ They insisted most vehemently on the danger that the “ constitution of the church would be in, when all should be “ under the power of a *British* parliament.—To allay this heat, “ an act was prepared for securing the Presbyterian government ; “ by which it was declared to be the only government of that “ church *unalterable in all succeeding times* ; and the maintaining “ of it was declared to be a fundamental and essential article and “ condition of the union: And this act was to be made a part of “ the act for the union, &c.—By this means the act was carried “ as far as any human law could go for their security. For by “ this they had not only all the security that their own parlia- “ ment could give them, but they were to have the *faith and au-* “ *thority* of the parliament of *England*; it being, *in the stipulation*, “ made an *essential condition* of the union.”

HE afterwards gives the history of the rise and progress of the *English* act of parliament; and concludes with exactly the same sentiments (with respect to the *power* of alteration, which must nevertheless still reside in the supreme legislature of the united kingdoms) as I have borrowed and adopted from the bishop of *Glocester*; and for which his lordship is pronounced by Dr. *Priestley*† to be as *weak a quibbler* as myself. “ The archbishop of *Canterbury*” (says Dr. *Burnet* ‡) “ moved that a bill might be “ brought in for securing the church of *England*. By it all acts “ passed in favour of our church were declared to be in full “ force *for ever*: and this was made a fundamental and essential “ part of the union. Some exceptions were taken to the words “ of the bill, as not so strong as the act passed in *Scotland* seemed “ to be, since the *government* of it was not declared *unalterable*. “ But they were judged more proper; since, where a supreme “ legislature is once acknowledged, nothing can be *unalterable*.”

THE

* Hist. of his own Times, ii. 461. † Page 12, 13. ‡ Burnet *ibid.* 463.

THE opinions of the other two noble lords were publickly declared in the debates on the statutes 5 *Geo. I. c. 4.* as they may be found in the periodical pamphlets of the times, and as they are since collected in volumes*. As that bill was originally constructed, it contained not only a repeal of the acts against *occasional Conformity* and *Schism*, which had been enacted *since* the union, but also of some clauses in the *Test* and *Corporation* acts, which were confirmed and perpetuated by that treaty. In the debates during the progress of that bill, the late duke of *Argyle* (at that time Earl of *Ilay*) said: “ that every body knew he was educated “ in a different way from the church of *England*: but nevertheless “ he could not but be against this bill; because, in his opinion, it broke the *Pacta Conventa* of the treaty of union, by “ which the bounds both of the church of *England* and of the “ church of *Scotland*, were fixed and settled: And his lordship “ was apprehensive, that if the articles of the union were broke “ with respect to one church, it might afterwards be a precedent to break them with respect to the other.”

LORD COWPER had said just before, “ that tho’ he had always “ a tender regard for the Dissenters, yet he could not but oppose that part of the bill then before the house, whereby part “ of the *Test* and *Corporation* acts were effectually repealed with “ relation to Dissenters; because he looked upon these acts as “ the *main bulwarks* of our excellent constitution in church and “ state, and therefore to be inviolably preserved.” And, upon the reasons thus offered in this debate, it was agreed to leave out all the clauses that affected the laws ratified by the union: and to pass the act as it now stands, containing merely a repeal of the two statutes of Queen *Anne* against *Schism* and *occasional Conformity*, and a provision that no magistrate should appear with the Ensigns of his office at a meeting-house.

A F T E R

* Historical Register, A.D. 1719, pag. 57, 58. Timberland’s Debates of the House of Lords, iii. 99. 101. 110.

AFTER this historical deduction, and contemporary exposition of these laws, I think it is not altogether certain, that either nation would fully acquiesce in Dr. Priestley's construction of the treaty of union: And, if they should not, the rescinding of any part of its fundamental and essential conditions, would be very *unadvisable* and *dangerous*. Indeed I have allowed that the power of new-modelling the churches both of *England* and *Scotland* (however *dangerous* its exertion might be) still resides in the parliament of *Great-Britain*; and have conceded that, in case the service of the church of *England* be *manifestly impious* or *shockingly absurd*, all dangers should be encountered to reform it. Dr. Priestley very roundly afferts*, that it is *manifestly impious*, is *shockingly absurd*, nay, that it is even *idolatrous*. Here then we meet upon fair ground. Let its *Idolatry*, *Impiety*, or *shocking absurdity* be proved to the satisfaction of the legislature; and my *political* objections are at an end. But, till that can be done, I shall continue to think it too hazardous, to move so momentous a question as the stability of the *British* union, for the sake of some fancied improvements in matters either trivial or indifferent. And, considering the subject in this light, any *bitter invective*, or *virulent declamation* against the mode of our national worship, is at least unavailing, and can *answer* no laudable end. Perhaps it was going too far to say it could be *calculated* for none. I am willing to hope, that whenever such things have appeared, they have arisen from mistake, or ignorance, or from the overflowings of a well-meant zeal, but not regulated according to knowledge.

WITH regard to the want of logical and historical knowledge which Dr. Priestley has discovered in the *Commentaries*, and his personal reflections on the author's political connections†, I shall leave him in full possession of them: remarking only, that this is not an age in which a man who thinks for himself, and who endeavours to think with moderation, can expect to meet with quarter from any side, amid the rage of contending parties. If, in a matter of mere history and speculation, he condemns the

conduct

* Page 8. 17.

† Page 6. and 34.

conduct of the elder *Charles*, but disapproves of the tragical extremes to which his opponents proceeded, he is a friend to Popery and arbitrary power ; whatever proofs to the contrary may abound in the rest of his writings. If, after a concurrence of many years together in most of their political measures, he differs from his friends in one great constitutional point, in consequence of the most diligent enquiry and mature reflection he becomes immediately *connected with*, and *possesses the confidence* of a ministry, to which he has scarce the honour to be known, and from which he holds himself totally detatched. If he argues for toleration and indulgence to Dissenters of every denomination, but censures with some warmth all indecent attacks upon the establishment, he commences a bigot and a persecutor. In this temper of the times, I am sensible that all apologies are idle, and all vindications useless. Yet I thought it a duty to myself thus publickly to declare, that my notions, in respect to religious indulgence, are not quite so intolerant as Dr. *Priestley* has endeavoured to represent them; especially as some expressions of my own, (not sufficiently attended to, when the work was revised for the press) may have countenanced such an opinion in a superficial or captious reader. But, when thus set to rights and explained, I trust they will give no offence to any moderate and conscientious Dissenter; and that Dr. *Priestley* himself, when he comes to re-consider his remarks, will wish they had been written less hastily, and had of course been more agreeable to justice as well as to common civility.

Wallingford, Sep. 2, 1769.

F I N I S.

A N

A N S W E R

T O

Dr. B L A C K S T O N E's

R E P L Y

T O

R E M A R K S

ON THE

FOURTH VOLUME

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A N

A N S W E R

T O

Dr. B L A C K S T O N E ' s

R E P L Y, &c.

S I R,

I HAVE just received your *Reply* to my *Remarks on some paragraphs in the Fourth Volume of your Commentaries*; and I sincerely thank and esteem you for it. It is a genteel and liberal answer to a pamphlet written, as you candidly and justly conjecture, in great haste; and which, I frankly acknowledge, is not, in all respects, such as I now wish it had been. You will give me leave, however, to observe, that I have not trespassed upon civility so far as you have represented, when you say, page 44, that I call you *a weak quibbler*. I only said you *argued weakly, and upon principles by which you might quibble away all the natural rights of man*. I did not even say that *you had quibbled* (indeed you have not touched upon that subject) much less did I

call you a *quibbler*. And I apprehend that, in point of decorum, there is an evident gradation in those expressions, and that the first which I have used, is not, by many degrees, so offensive as the last, which you have ascribed to me. With respect to my charging you with *the want of logical and historical knowledge*, the very turn of my sentences shews that I was not serious.

As angry as my pamphlet appears to you, I do assure you, Sir, it never entered into my head, that any thing in your Commentaries was personally levelled at me; nor, till I saw your pamphlet, could I have imagined, that such a construction could have been put upon my words. Fifteen years ago, when you say your Commentaries were written, I was so far from having *appeared as an author*, that I could hardly be deemed capable of writing at all; but I conceived myself to be insulted in the injurious representations you had given of the principles and practices of the *Dissenters in general*; and so long as I am capable of writing, as well as of feeling, I cannot promise, that I shall always be able to let things of such a nature, coming from persons of reputation and influence, pass without notice. The resentment I shewed was at your own insinuation, that *the spirit, the doctrine, and the practices of Dissenters, as such, were not calculated to make men good subjects*; a reflection that could not but deeply affect a large body of men, who consider themselves, and who imagined they had been considered by others, as most zealously attached to the constitution of this country, as a limited monarchy; to be foremost in their zeal for the settlement of the crown on the house of Hanover; and, indeed, to be most nearly interested in it.

IF I mistook your meaning, in supposing that your reflections were intended for the *modern* Dissenters, I can assure you, that superficial and captious as you take me to be, I was far from being singular in that mistake. It was the construction that every person that I have yet conversed with upon the subject, put upon them; and the paragraphs I have animadverted upon were
actually

actually considered by many persons, as a notification to Dissenters, in what light they were considered by those who are now in power. They even gave great offence to many worthy and distinguished members of the established church ; and affected some of them, who could not be called *willing critics*, with as much indignation as they did me. But the generous manner in which you promise to correct those offensive paragraphs, does you the greatest honour, and more than cancels all that is past.

THOUGH, after your example, I composed and delivered a course of lectures on the constitution and laws of England (a syllabus of which is printed in my *Essay on a course of liberal education for civil and active life*) I profess to be no more than a very superficial lawyer ; I am even ashamed to touch upon a subject of this kind, in writing to a man of your distinguished abilities in this way, and I shall not choose to debate the matter with you ; yet I must own, that you have not convinced me that *mere nonconformity* is any crime in the laws of England. I apprehend it to have been no offence at common law, and that since all penalties inflicted by particular acts of parliament, are declared by the *act of toleration*, not to extend to those who comply with the terms of that act, that such persons are in no sense criminal. The church of England has no authority but what it derives from the sanction of parliament, so that our privileges stand exactly upon the same ground. *Some Nonconformists*, it is acknowledged, are guilty of a crime in the eye of the law, and so are *some men* ; but is it therefore proper to say, that *mere humanity* is criminal ?

ADMITTING mere nonconformity to be a crime, I should readily have agreed with you, that *reviling the ordinances of the church was a crime of a grosser nature*. I only objected to the reasons you gave for asserting it to be a crime so aggravated, namely, *its carrying with it the utmost indecency, arrogance, and ingratitude* ; and still more, to the manner in which you prove it to be indecent, arrogant, and ungrateful.

I M U S T also beg leave still to dissent from you, with respect to the perpetuity of the ecclesiastical establishments of England and Scotland being intended to be provided for by the *act of union*. I still think that all that those persons, who framed it, really meant, was to bar all encroachments of the one upon the other. Were any man now living to tell me he was going to prepare an instrument, whereby he should bind himself, and his heirs for ever, from changing their opinions, or from acting in consequence of any change in them, I should not easily believe him ; and that the representatives of two great and wise nations should seriously act in this manner is, to me, altogether incredible. If the fact be otherwise, it is such as, in my opinion, throws the greatest reflection on the founders of both establishments, and also on the establishments themselves. But it appears to me, from the paragraph you have quoted from *bishop Burnet*, page 44, “ that the reason of the *act of a Scottish parliament*, intended to secure the *Presbyterian government*, previous to the *union*, was nothing else than the danger, they apprehended the *constitution of their church* to be in, from the power of a *British parliament*.” The same principle also influenced the *duke of Argyle*, as you have represented his conduct, page 45.

I S H O U L D also be disposed to infer from the passage you have quoted from *Bishop Burnet*, page 44, that our legislators, at the time of the *union*, expressly disapproved of the *Scots* having declared their church establishment to be unalterable ; since, where there is a supreme legislature, nothing can be so. This is the construction put upon those very words by the ingenious author of “ *Occasional remarks on some late strictures on the Confession*—“ *al, part II. page 45.*” which I had not seen when I wrote my *Remarks*.

Y O U say, Page 47, “ that you condemn the conduct of the elder Charles, but disapprove of the tragical extremes to which his opponents proceeded.” I also sincerely say the same ; for, though

though I go one step farther than you do, having no idea of exempting from punishment any person placed in an office of trust, how great and important soever; yet I neither approve of the usurpation of Cromwell, nor of the attempts that were made to establish a republic in this nation.

You say, Page 31, " that you have barely recited the statute against Arians, without approving or disapproving it." I was led to think you approved of it, by the whole tenor of the paragraph in which it is introduced. The words that immediately precede it are these: " Under these restrictions, it seems necessary, for the support of the national religion, that the officers of the church should have power to censure heretics, but not to exterminate or destroy them. It has also been thought proper for the civil magistrate again to interpose, with regard to one species of heresy, very prevalent in modern times; for statute, &c." This I think, will be some apology for my mistaking your meaning.

YOUR saying that *many Dissenters divided from the established church upon no reason at all*, tempted me to mention the strongest reason that I had for my own dissent, relating to the proper unity of God; but the severe censure I passed on the opposite opinion, namely, the impiety of it, I at the same time, declared to be by no means applicable to those persons who are conscientious in their belief. Important however as I conceive this doctrine to be, affecting what is most fundamental in both natural and revealed religion, and consequently in all the establishments of it, I do not think it my business, as you hint to me, to address the legislature upon the subject, conceiving, that as a teacher of christianity, I have nothing to do with men as magistrates, but only as individuals.

I SHALL think myself very happy if by means of this letter I be able in any measure to recover my character for candour with

with a person of whose abilities, as a writer, I have formed, and in the height of my resentment expressed, so high an opinion. Many persons however of taste, and liberality of sentiment, and persons no way connected with me in religious persuasion, friendship, or even acquaintance, acquit me in this respect; and I believe, that considering the provocation, the world in general will acquit me, but I do not acquit myself; and had I been convinced that I had done you injustice on any other respect, I should have acknowledged it with the same frankness.

My pamphlet, if it be the occasion of making the slightest improvement in a work so valuable as yours, will not be without its merit to the public. It was literally the creature of a day, and, figuratively speaking, its existence cannot be of much longer duration; whereas your Commentaries on the laws of England will probably last as long as the laws themselves.

I AM not so indifferent to reputation with men of sense, eminence, and worth, as lightly to incur the displeasure of a person of your character. Nothing would have induced me to risque it, but the superior regard I conceived to be due to the cause of truth and that respectable part of the community to which I belong, the protestant Dissenters; men, who notwithstanding their misfortune with respect to their religious sentiments, have, in the opinion of those whom we think impartial, and liberal minded, great merit with their fellow citizens, and are equal friends to the peace as well as to the liberties of this country.

I am, Sir, yours, &c.

Leeds, Octo. 2, 1769.

J O S E P H P R I E S T L E Y.

F I N I S.

T H E
C A S E
O F T H E
L A T E E L E C T I O N
F O R T H E
C O U N T Y o f M I D D L E S E X,
C O N S I D E R E D
O n t h e P r i n c i p l e s o f t h e C o n s t i t u t i o n ,
A N D T H E
A U T H O R I T I E S o f L A W .

By t h e A U T H O R o f
C O M M E N T A R I E S o n t h e L A W S o f E N G L A N D .

A M E R I C A :

P R I N T E D F O R T H E S U B S C R I B E R S ,
By R O B E R T B E L L , a t t h e l a t e U N I O N L I B R A R Y , i n *Third-street* ,
P H I L A D E L P H I A . M D C C L X X I I I .

T H E

C A S E

Of the late ELECTION, &c.

THREE is a crisis, when, on certain subjects, the sober representations of truth and reason, are of little avail against the misguided impetuosity of public prejudice.

HAPPILY, however, an intemperance of this kind is generally as transient as it is violent; and, as its rage abates, the minds of the people become open to conviction.

THREE is a regard due even to the misapprehensions of the public: And no prudent administration will be inattentive to what is called popular clamour.

INDEED the public opinion is seldom erroneous, when founded on just information: But removed, as the far greater part are, from the source of true intelligence, how easy is it for those who have an interest in imposing on the public, to mislead them by false representations, and alarm them with vain apprehensions?

IMPELLED by such mistaken motives, how frequently have the people concurred in measures, which tended to defeat the

very ends they had in view, and which were ultimately destructive of their own good?

BUT there is that justice and generosity in the public, not always to be found in individuals. When the people, by candid and temperate arguments, are persuaded that their opinions and apprehensions are groundless, they are ready to renounce them and to turn their resentment against those who have deceived and misled them.

LATER times scarce afford a stronger instance of misapprehension, than that which possessesthe minds of some persons, with respect to the late important determination of the election for the county of Middlesex.

As few are acquainted with the true slate of this great constitutional question, the writer of these sheets, who has taken some pains to investigate it, thinks it the duty of a good citizen, to submit those reasons and authorities to the judgment of the public, which have brought conviction to his own mind.

To this end, he proposes to shew from the records of parliament, and the authorities of law, that the house of commons is legally invested with the power they have exercised with respect to the late determination of the election for Middlesex.

FARTHER, that, on the general principles of reason and constitutional policy, they ought to have such a power: And that, in the instance in question, they have exercised their power in a just and constitutional manner, not only according to the law and usage of parliament, but in strict conformity with the adjudications in the court of Westminster, on similar occasions.

THAT the reader may be the better able to judge of the arguments tending to prove these propositions, it will be necessary previously to state the proceedings of the house this session, with respect

respect to Mr. *Wilkes*; more especially as the mistakes and misapprehensions, which possess the minds of some, arise from the want of being acquainted with these proceedings, or of considering them with due attention and accuracy.

MR. WILKES, in the last parliament, was expelled from the house of commons. Being, moreover, by the verdicts of his country, convicted of crimes, for which infamous punishments have not unfrequently been inflicted, he thought proper to abscond; so that sentence could not then be passed upon him: Whereupon he was outlawed.

ON the eve of the general election he nevertheless appeared in public; and though an outlaw, was elected one of the knights of the shire for the county of Middlesex. His outlawry however was afterwards reversed, and sentence was passed upon him; in pursuance of which, he was committed *in execution*, to the prison of the king's bench.

BEING in this situation, he himself brought the consideration of his particular circumstances before the house, by his own petition; which occasioned them to call for the records of the king's bench, whereby the several convictions against him, and the sentence passed thereon, appeared before the house.

HIS petition having been heard and determined, he was afterwards charged with a new offence; that of writing a preface to a letter which had been printed in the public papers: And in the beginning of February last, being at the bar of the house of commons, he confessed himself the author and publisher of the preface under consideration; which the house then resolved to be an insolent, scandalous, and seditious libel: And afterwards came to the following resolution;

“R E S O L V E D,

“ R E S O L V E D,

“ T H A T John Wilkes, Esq; a member of this house, who
 “ hath, at the bar of this house, confessed himself to be the au-
 “ thor and publisher of what this house has resolved to be an infor-
 “ lent, scandalous, and seditious libel: And who has been con-
 “ victed in the court of king’s bench, of having printed and pub-
 “ lished a seditious libel, and three obscene and impious libels,
 “ and by the judgment of the said court, has been sentenced to
 “ undergo twenty-two months imprisonment, and is *now in exe-
 “ cution* under the said judgment, be expelled this house.”

Whereupon it was

“ O R D E R E D,

“ T H A T Mr. Speaker do issue his warrant to the Clerk of the
 “ crown, to make out a new writ for the electing a knight of the
 “ shire to serve in this present parliament, for the county of Mid-
 “ dlesex, in the room of John Wilkes, Esq; expelled this house.”

MR. WILKES, however, being nevertheless returned, the House, on the 17th of February 1769, came to the following resolution;

“ R E S O L V E D,

“ T H A T John Wilkes, Esq; having been, in this session of
 “ parliament, expelled this house, was, and is, *incapable of being
 “ elected* a member to serve in this *present parliament.*”

IT appearing to the house, that there was no other candidate at the last election, it was resolved, farther, That it was a void election: And it was

“ O R D E R E D,

“ T H A T Mr. Speaker do issue his warrant to the clerk of the
 “ crown to make out a new writ, for the electing a knight of the
 “ shire

“ shire to serve in this present parliament, for the county of Middlesex, in the room of John Wilkes, Esq; who is ADJUDGED incapable of being elected a member to serve in this present parliament, and whose election for the said county has been declared void.”

A GREAT part of the freeholders of Middlesex, however, being influenced by a mistaken bias, obstinately persisted in their choice, and Mr. Wilkes was again returned. Whereupon the house resolved the election and return of Mr. Wilkes to be null and void; and, no other candidate appearing to the house, they ordered a new writ.

AT the next election, Mr. Wilkes, notwithstanding the resolutions of the house, was again named as a candidate and returned.

WHEREUPON the house again resolved the election of Mr. Wilkes to be null and void. But, it appearing to the house that there were other candidates, they ordered the poll to be brought before them; and it appearing on the face of the poll, that, of the candidates capable of being elected, Mr. Lutterell had the majority, they resolved, that Mr. Lutterell ought to have been returned, and ordered the return to be amended, by inserting his name in the room of Mr. Wilkes: At the same time they allowed the usual liberty for any party to petition on the merits of the election.

IN consequence of this, fifteen freeholders did prefer a petition; and on hearing the merits of that petition, the house resolved that Mr. Lutterell was duly elected.

IN order to shew that the house of commons is legally invested with the power they have exercised on this occasion it will be necessary to explain the nature and extent of the powers constitutionally vested in that house.

To preserve the equal poise, which the jealousy of our constitution has endeavoured to settle, the three orders of the state are invested with separate, as well as conjunct powers.

THE power of legislation is joint ; and there can be no act of *legislation*, which has not received the consent of the *three estates* : But besides their *legislative* power, each house has a *judicial* capacity, for the maintenance, among other purposes of its own authority and independence. The peers, in their house, as lord *Coke* says, have power of judicature, and the commons, in their house also have power of judicature : And farther, as he adds, both houses together, have power of judicature* ; and for this, he refers to the records of both houses.

THE rule, and only rule, by which their power of judicature is directed, is the *law of parliament* : which, as will appear, is part of the *law of the land*.

As every court of justice, says lord *Coke*†, hath laws and customs for its direction, some by the common law, some by the civil and canon law, some by peculiar laws and customs, &c. so the *high court of parliament subsists by its own proper laws and customs*.

IT is declared by the records of parliament, that all weighty matters moved concerning the peers of the realm, ought to be determined, *adjudged* and discussed by the *course of parliament*, and not by the civil law, nor yet by the common laws of the land used in other courts of the realm†.

THE same declaration, for the like reason, says lord *Coke*, respects the *commons*, for any thing done or moved in their house : And this is the reason, he adds, why the *judges ought not to give any opinion of a matter of parliament, because it is not to be decided by the common law, but according to the law and custom of parliament* ;

* 4 Inst. 23.

† 4 Inst. 14.

‡ 11 R. 2. n. 7.

liament; and so the judges (he concludes) in divers parliaments have confessed*.

Thus it appears not only from the several declarations of the judges of the land, at different times, but from the authority of the records themselves†, that there is a *law of parliament* which, in matters thereby cognizable, is distinct from, and independent of all other laws; but is, nevertheless, a branch of the *law of the land*.

THE *law of parliament* is as much the *law of the land*, as the *common law*, or any other branch of the *general law*, which governs in this realm. Lord Coke, enumerating the several branches of which the law of the realm consists, mentions the *law of parliament* as second in order.

COOPER, afterwards lord Cooper, in his speech in the case of *Ashby and White*, says the *law and custom of parliament is a part of the law of the land*, and, as such, OUGHT TO BE TAKEN NOTICE OF BY ALL PERSONS.

LORD Chief Justice Holt, in his argument concerning the granting of a *habeas corpus* to the *Ailesbury men*, says, “ *We are bound to take notice of the customs of parliament*, for they are a part of the *law of the land*; and there are the same methods of knowing it, as of knowing the law in *Westminster-hall*.”—In another place he says, *The law and custom of parliament, is as much the law of the land as any other law*.

THE same language is held by Hale, Petyt, Whitlocke, &c. and will be found, in the course of these sheets, to have been pronounced

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* By the record of parliament 31 H. 6. n. 27. the judges being consulted concerning the release of some members of the commons, who had been imprisoned in the vacation, they answered, “ That it was not their part to judge of the parliament, which was judge of the law.”

† The records of parliament, as lord Coke observes, are the truest histories.

from time to time, by the courts of justice. In short, all who have ever written, or spoken on this subject, have treated the *law of parliament*, as part of the *law of the land*, and as a law which all persons are bound to take notice of.

IT is by this law, and by this only, that the house of commons regulate their proceedings, with respect to the various subjects of the jurisdiction they exercise.

THE *law of parliament* may be considered as composed of two branches: 1. The rules, orders, customs and course of the house, with their expositions of, and decisions upon the law, with respect to matters within their jurisdiction.

THE customs, course, and common judicial proceedings of a court, are the *law of the court*, of which the common law takes notice, without alledging or pleading any usage or prescription to warrant them*.

THAT the course of any particular court is a law, and that the determinations of a court make part of the law of the land has been held from the earliest times, so far back even as the year book of 11 E. 42 b.

THUS the rules, orders, and course of the *house of commons*, with their exposition and decisions on matters cognizable before them, are as much the law of the land, as the rules and orders of the court of *king's bench*, or any other court, with their determinations are the law of the land. Nay, such proceedings and decisions of the house of commons, are in truth more binding than those of the courts at Westminster, because from the former there lies no appeal, and it is essential, as will be shewn, to the preservation of public liberty, that no appeal should lie.

2. THE

* 2 Rep. 53.

2. The second branch, composing the law of parliament, consists of the *statute law* of the realm, so far as the same regards the house of commons, or the jurisdiction thereof.

It will not be material, on the present occasion, to enquire into the various subjects over which the jurisdiction of the house of commons extends. It will be sufficient, with regard to the question now under consideration, to shew not only from the authorities of the most ancient and respectable lawyers but from the records of parliament*, that the house of commons—

1. HAVE the sole and exclusive power of punishing their own members, *as such*; either by commitment, suspension, expulsion, or otherwise.

2. THAT they have the sole and exclusive power of examining and determining the rights and qualifications of electors and elected, together with the returns of writs for the election of members, and in short all matters incidental to such elections.

1. As to their power of punishing their own members, by commitment, suspension†, or expulsion‡, &c. the instances of the

I 2 exercise

* The journals of the house of commons are records, and mentioned as such 6 H. 8. c. 16.

† M E M B E R S S U S P E N D E D.

Mr. Payne, For an offensive speech: and complained of as a purveyor, &c. Suspended the 3d of April 1604, till the doubt be cleared, whether he might serve.

Mr. Barber, For granting warrants for billeting soldiers.—Suspended the 9th of April 1628, during pleasure.

Sir Jo. Jacob, For monopoly—Suspended the 21st of Nov. 1640, till his cause be heard.

Mr. Hollis, For offensive words—Suspended the 26th of April 1641, during that session of parliament.

Mr.

exercise of those powers are innumerable, and the occasions on which it has been exercised are various.

WITH regard to commitments, their power will not be disputed: but with respect to *suspensions* and *expulsions*, more especially the latter, some, with what reason will be seen hereafter, have affected to call it in question.

IT

Mr. Philips, For sitting in the pretended high court of justice, &c.—Suspended the 27th of June 1661, till committee report, and house give judgment.

Mr. Love, For not communicating—Suspended the 3d of July 1661, till he bring certificate of having communicated.

Sir Wm. Penn, For fraud and embezzlement.—Suspended the 21st of April 1663, while impeachment depending against him.

Sir John Prettiman, For imposing on the house, with regard to the protection of his servant, Robert Humes—Suspended the 8th of April 1670, till he shall produce Robert Humes.

Mr. Culliford, For several misdemeanors—Suspended the 8th of March 1692, till he attend to answer.

† M E M B E R S E X P E L L E D.

Arthur Hail, For a slanderous libel, derogatory to the authority of the house, &c. 14th Feb. 1580.

Sir John Bennet, For bribery, 23d April 1621.

William Sandys, Sir Jo. Jacob, and Thomas Webb, For monopoly, 21st Jan. 1640.

Mr. Taylor, For words impeaching the justice of the house, 27th May 1641.

Mr. Benson, For selling protections, 2d Nov. 1641.

Mr. Ashburnham, For receiving 500l. from French merchants, 22d Nov. 1677.

Mr. Sackville, For aspersing the King, 25th March 1679.

Sir Francis Wythers, For presenting an address to his Majesty, expressing an abhorency to petition his Majesty for calling parliaments, 29th Oct. 1680.

Sir Robert Beyton, For secret negotiation with the duke of York, 14th Dec. 1680.

Sir Henry Furnese, For breach of duty, as trustee for circulating exchequer bills under the 5 and 6 W. and M. 19th Feb. 700.

Mr. Asgill, For being the author of a book, containing many *profane* and *blasphemous* expressions, 18th Dec. 1707-8.

Mr.

IT appears from the list in the note underneath, that the house have suspended their members, sometimes during pleasure, sometimes till the member suspended does a certain act, or till something depending be determined ; and, at other times, during that particular session of parliament ; and the causes of these suspensions, it is seen, are as well for offences committed without the house, as within it.

WITH respect to expulsions, they are much more numerous than suspensions. In the earlier times, before the parliamentary stile had acquired that accuracy which it has since attained, we find this sentence variously expressed. Sometimes it is that the member be severed and cut off; sometimes, that he be removed; at other times, that he be discharged, and at other times that he be put out; which are only so many synonymous expressions signifying expulsion :—and the word *expelled*, has for more than a century past been constantly used on these occasions.

FROM the note in this and the foregoing page, the reader will perceive the various causes for which this sentence has from time to time been inflicted. Sometimes for offences against *religion* sometimes for offences against the *state*, sometimes for offences against *morality*, and at other times for offences against the *house* merely.

BUT

Mr. Ridge, For fraud as a contractor, 15th Feb. 1710.

Mr. Walpole, For breach of trust and corruption, 17th Jan. 1711.

Mr. Steel, For a *scandalous and seditious libel*, 18th March 1713.

Mr. Prys, For a contempt of the house, 23d March 1715.

For other instances, the reader may refer to the journals of 10 May 1571, 2d March 1620, 21 Jan. 1628, 21 Jan. 1640, 2 Feb. 1640, 27 May 1641, 30 Oct. 1641, 9 Dec. 1641, 2 Feb. 1641, 9 March 1641, 12 May 1642, 10 Aug. 1642, 11 June 1660, 21 April 1668, 1 Feb. 1677, 25 March 1679, 28 Oct. 1680, 13 May 1689, 12 March 1694, 26 March 1695, 1 Feb. 1697, 20 Feb. 1698, 22 Feb. 1698, 16 April 1701, 1 Feb. 1702, 19 Feb. 1711, 10 Jan. 1715, 22 Jan. 1716, 23 Jan. 1720, 28 Jan. 1720, 8 March 1720, and many others.

BUT however various the causes of expulsion may have been, the effect of it is constantly the same: For the *necessary* consequence of expulsion is, that the person expelled shall be incapable of being elected again to serve in the same house of commons that expelled him. This incapacity is implied in the very meaning of the word itself. Should any man of plain sense, nay should any young academecian or school-boy even, be asked what was understood by expelling a man from any society, they would certainly answer, " The meaning is, that he shall never be a member of *that* club, or of *that* college, or of *that* school any more."

EXPULSION clearly, *ex vi termini*, signifies a total, and not a partial, exclusion from the society or parliament from whence he is removed. If a member is excluded during pleasure, or for a certain time only, that is, properly speaking, a SUSPENSION, and not an EXPULSION: And the House themselves, as has been shewn, have made the distinction in many cases, by making use of the word *suspended*, where they meant the exclusion to be temporary; that is, either during pleasure, or for that session, or till some end be attained. But when a member is *expelled*, he is not excluded from the meeting of that day, or of that session, but from *that* parliament; that is, from that body of which he is a member.

No one, acquainted with the constitution and practice of parliament, will deny that the house have a right to expel their own members. Indeed their right is established by such immemorial usage, and has been exercised in such a vast multiplicity of instances, that it is impossible to dispute it.

IT is not only evident from precedents, that the house have a power of expulsion, but it is clear from the reason of the thing that they ought to have such a power. Otherwise the most unworthy and unfit representatives may sit in parliament, to the disgrace and detriment of the nation. Since it is not pretended that any such power is, or can be, lodged any where else.

BUT

BUT to admit their right of expelling, and argue that the member expelled may be re-elected that parliament, is to contend for the grossest absurdity imaginable ; it would expose the judicature of the house of commons to the most flagrant insult and contempt ; it would render the determination of the house of commons, totally nugatory, if the member whom they expelled to-day, should be forced upon them again to-morrow. Should such an extravagant absurdity be once admitted, the determinations of the *house of commons*, which is a court of judicature, from whence there lies no appeal, would in fact become of less weight and authority than the lowest court now existing.

No man therefore who means to argue seriously and candidly will contend that a member expelled to-day, is capable of being elected the next day. For by whom is he expelled ? Why by the people of Great-Britain assembled by their representatives.—And shall a part of the people, shall the electors of a particular county say,—We will not be bound by the judgment of the majority —We will elect no other to represent us than the person expelled ? Shall *they* be at liberty to restore him, who had no power to expel him ? Certainly not.

SUPPOSE, for the sake of argument, that the people instead of being assembled by their representatives, had been personally convened. Though in such case every man would have a right of being present at an assembly where his own interest, among that of others, is in agitation, yet will any one say that he may not forfeit that right by indecorum, by treachery, by immorality, &c ? And are not the majority of the assembly the sole judges of his fitness to continue a member ? If they judge him incapable, may they not expel him ? and can he ever acquire a seat in that assembly again, against the sense of the majority ?

IT is the same where a member is expelled by the representative body. They whom he represents have no power of obtruding him into the national assembly again, against the sense of the majority.

majority. For it is to be observed, that though every member is chosen by a particular county or borough, yet, as is justly observed by lord Coke and others, when in parliament, he serves for the whole nation. Consequently he ought not to sit in parliament, against the sense of the majority in that nation, expressed by their representatives.

If, for want of proper information, or due consideration of the nature of the offence, the cause of expulsion should not in the apprehension of the electors, be sufficient to warrant such a punishment, yet they are nevertheless bound by the determination of the majority in the representative body, to whom they have resigned their right of private judgment in this instance, and who are, and, as will be shewn, ought to be the sole judges in such cases.

THOUGH the house cannot, and God forbid they ever should, say whom the electors shall choose, yet they may declare who by law are *not to be chosen*: And by expelling a member, they declare, without saying more, that he is incapable of being elected for that parliament.

THESE cannot be a stronger instance that, in the general sense of mankind, such incapacity is the necessary effect of expulsion, than that of there having never been any attempt made to re-elect one in the same parliament, out of the very many who have been expelled, except in the single instance of *Robert Walpole*, Esq; and then the house, as will be seen, declared the effect of their vote of expulsion.

THIS case however has been cited on the other side, in order to destroy the inference, that the incapacity contended for is the necessary effect of expulsion,

BUT, from the bare state of this case, it will manifestly appear that it proves the direct contrary of the proposition it is cited to establish.

ROBERT WALPOLE, Esq; after having been expelled, was re-elected: Upon which the house

“ RESOLVED,

“ THAT Robert Walpole, Esq; having been that session of parliament, expelled the house, *was*, and is incapable of being elected a member to serve in that present parliament.”

Now, say they, the expulsion did not of itself render him incapable of being re-elected: If it had, there would have been no occasion for such a resolution.

BUT they who advance this argument must certainly have read the resolution inconsiderately, or they must argue against conviction. The very words of the resolution, if they attend to them, clearly import that the incapacity *was created* by the *expulsion* itself. For what does the resolution say? not simply that *he is* incapable of being elected, but that *he was*, and *is* incapable, &c. Was incapable! By what, and when? Why, by the operation of the former vote of expulsion, and from that time when that resolution passed. The subsequent resolution does not *create* the incapacity, but (by the word *was*) refers to the incapacity already created, and (by the word *is*) declares that incapacity still to have continuance. So that the last resolution, not being confined to the time present, but referring to the time past, does thereby only explain and expound the meaning and effect of the former resolution. Nothing therefore can be more absurd than to urge an opinion from *implication only*, contrary to that which is declared in *express* words.

STILL, however, it is said that the incapacity of being elected is not a necessary consequence of expulsion: And to support this strange proposition, they cite another case of one Richard Woolaston, who was expelled 20 February 1698, and was afterwards re-elected, and served in that parliament.

BUT this case, when it is examined, will by no means prove what it is cited to establish. For though the house, somewhat *inaccurately*, used the word expelled, yet when the cause of his *expulsion* is considered, it will appear that his incapacity was of a temporary nature.

THE question put at that time was, “ That Richard Woolaston, Esq; being a member of the house of commons, and having since been concerned and acted as a receiver of the duties upon houses, and also upon births, &c. contrary to the act made in the fifth and sixth years of his majesty’s reign, &c. be expelled this house.” Which, upon a division of 184 against 133, was carried in the affirmative.

THUS it appears, from the words of the resolution itself, that the cause of disqualification in this case was merely *temporary*; and the fact is, as appears upon record, that, at the time of his re-election, he no longer held that office: So that he was then unquestionably eligible.

INDEED the house could never be presumed to intend that the effect of their vote should be *permanent*, when the cause, as declared by themselves, was only *temporary*: For the cause of disqualification ceasing, the effect must cease of course. But where the cause of expulsion is *permanent*, there the effect is permanent likewise, and must operate to exclude him from the body whence he has been expelled, so long as that body exists. No one therefore can pretend that this case is, in any respect, similar to the principal case under consideration:

As little will the case of *Sawyer*, which has been mentioned on the other side, serve to maintain the doctrine which it is cited to prove; that is, That a member expelled is elegible again in *that* parliament. For, in truth, *Sawyer*, was expelled just before the dissolution of the parliament, and he was not in fact elected again till the *subsequent* parliament.

UPON the whole therefore, whether we consider the obvious and common acceptation of the word expulsion, or the natural inference to be drawn from the common usage and course of parliament, in such cases, it is manifest that the incapacity of being re-elected, is, and has always been considered as, a necessary effect of expulsion.

As there is no reason however to fear the force of any argument which can be urged against the proceedings of the house in this case, let it be admitted for a while that expulsion does not of itself create an incapacity of being re-elected, yet still it will appear that the house of commons, not only as expositors of their own resolutions, but as expositors of the *common* and *statute* law of the land, in cases where their jurisdiction is competent, have a right to declare who are, and who are not eligible as members of parliament. This leads to the consideration of the next proposition; which is—

2d, That they have the sole and exclusive power of examining and determining the rights and qualifications of electors and elected, together with the returns of writs, and all matters incidental to elections.

THESE rights they have asserted and exercised from time immemorial, and have, with a firmness to which we owe the liberties we now enjoy, withstood and repelled all attempts made either by the crown, the peers, or the courts of law, to usurp, or in any degree encroach upon, these great and constitutional points of jurisdiction.

ATTEMPTS of this kind have been made in various shapes; some, openly and directly; others in a covert and collateral manner. But that the reader may judge for himself on a subject of such importance, I will state the most material contests relative to matters of jurisdiction, in a full and perspicuous point of view, according to the order in which they occur.

THE first time I shall take notice of when the commons had occasion to assert their right of jurisdiction, was in the *Norfolk* case, the 29 Eliz. 1586, which is stated in *Carew*, but more satisfactorily in *D'Ewes's* journal of the house of commons, and which was shortly thus:

THE sheriff of Norfolk received a writ, for the election of two knights, but two days before the next county day. By reason of the shortness of time, he could neither summon many freeholders, nor make due proclamation in the county, any one day before the election. The sheriff, notwithstanding on the county day, proceeded to the execution of the writ, and Mr. Farmer and Mr. Gresham were duly chosen. After this a second and new writ, was delivered to the sheriff for a new election, which was executed likewise, without any colour of misfeasance; and thereby Mr. Heydon and Mr. Gresham were duly chosen: And the indenture of their election, with the writ, were delivered to the clerk of the crown, together with the writ and indenture of the former election.

THE lord chancellor and the judges, at a meeting held on the subject of these elections, held, that the first writ was well executed; that the first election was good, and the second absolutely void. Of this their resolution they gave notice to the house of commons:

WHEREUPON the following points were resolved by the whole body of the house of commons:

I. THAT

1. THAT the first writ was duly executed, and the election good, and the second election absolutely void.
2. THAT it was a most perilous precedent, that after two knights of a county were duly elected, any new writ should issue for a second election, *without order of the house of commons itself.*
3. THAT the discussing and *ADJUDGING this, and the like differences, ONLY, belonged to the said house.*
4. THAT though the lord chancellor and judges were competent judges in their proper courts, yet *they were not in parliament.*
5. THAT it should be entered in the very journal book of the house, that the first election was approved to be good, and that the knights then chosen had been *received and ALLOWED as members of the house, not out of any respect the said house had, or gave to the resolution of the lord chancellor and judges therein passed, but merely by reason of the resolution of the house itself,* by which the said election had been approved.
6. THAT there should be no message sent to the lord chancellor, not so much as to know what he had done therein, *because it was conceived to be a matter derogatory to the power and privilege of the said house.*

THUS we find that the house of commons, even in these early days, were so justly jealous of their jurisdiction in these respects, that they resolutely and explicitly asserted their *sole right of adjudging this and the like differences:* And though they concurred with the chancellor and the judges, in their decision on the merits of this case, yet they were scrupulously careful to have it entered upon record, that they received and *allowed* the knights as members, not out of any regard to the resolution of the chancellor and the judges, but solely from their *own resolution.*

THE firm and spirited conduct which the house of commons displayed on this occasion, is the more remarkable, as during that reign, the dignity and privileges of that house, were not always regarded with due consideration.

ANOTHER attempt was made on the jurisdiction of the commons in *Goodwin's case*, 1 James I, printed in the journals of the house, and the 7th vol. of State Trials. This case was re-printed in the year 1704, by order of the house of commons, on occasion of the famous debate on the *Aylesbury election*; which will be taken notice of in its order. The case of *Goodwin* was as follows:

SIR FRANCIS GOODWIN was elected knight of the shire of the county of Bucks? but the return of his election being made it was refused by the clerk of the crown: And the return of Sir John Fortescue, who had been elected upon a second writ was entered. Whereupon the question was put, after long debate, "Whether Sir Francis Goodwin were lawfully elected and re-
" turned? which was resolved in the affirmative."

THREE days after, the lords sent a message to the commons, that there might be a conference about Goodwin's election: To which the commons answered, "That they did con-
" ceive it did not stand in *honour* and *order* of the house, to give
" account of any of their proceedings and doings."

THE lords replied, that the king having been acquainted with what had passed in Goodwin's case, thought himself engaged in honour to have the affair debated again, and had ordered them to confer with the commons upon it. Whereupon the commons, by their speaker, gave their reasons to the king, why they could not admit of this innovation. But all they could obtain was, that, instead of a conference with the lords, the king commanded them to confer with the judges.

This mandate, to which the house were extremely averse produced very warm debates. One member, with becoming spirit, observed, " That by this course the free election of the country was taken away, and none would be chosen but such as pleased the king and council. Let us therefore," says he, " with fortitude, understanding and sincerity, seek to maintain our privilege; which cannot be construed any contempt in us, but merely a maintenance of our COMMON RIGHT, which our ancestors have left us, and it is just and fit for us to transmit to our posterity."

ANOTHER member said, boldly, " This may be called a quo warranto to seize our liberties.—Our hands were never sought to be closed before. It opens a gap to thrust us all into the petty bag. A chancellor may call a parliament of what persons he will by this course. Any suggestion may be cause of sending a new writ. Judges cannot take notice of private customs or privileges: But we have a privilege which stands with the law."

At length, the question being put, Whether they should confer with the judges? It was carried in the negative, by a general voice, *No conference.*

IN the end, a committee was appointed to prepare answers in writing, to the four objections which the king had made to the reasons urged by the speaker. As the third and fourth objections do not apply to the present purpose, it will be sufficient to take notice of the first two.

OBJECTION 1. " That we assume to ourselves power of examining of the elections and returns of knights and burgesses, which belongeth to your majesty's chancery, and not to us: For, that all returns of writs were examinable in the courts wherein they were returnable; and the parliament writs being returnable

able into *chancery*, the returns of them must needs be there examined, and not with us.

OUR humble answer is, that until the 7th year of king Henry the 4th, all parliament writs were returnable into parliament, as appeareth by many precedents of record, and consequently the returns there examinable.

ALTHOUGH the form of the writ be somewhat altered by this statute, yet *the power of the parliament to examine and determine of elections* remaineth; for so the statute hath been always expounded ever sithence, by use to this day: And for that purpose, both the clerk of the crown hath always used to attend all the parliament time, upon the commons house, with the writs and returns: And also, the commons, in the beginning of every parliament, have ever used to appoint special committees, all the parliament time, for examining controversies concerning elections and returns of knights and burgesses; during which time the writs and indentures remain with the clerk of the crown; and after the parliament ended, and not before, are delivered to the clerk of the petty bag in chancery, to be kept there: which is warranted by *reason* and *precedents*. By *reason*: for that it is fit that the *return* should be in that place examined, where the *appearance and service of the writ is appointed*: By *precedents*; of which they cited many, too tedious to be here enumerated, and then conclude, that,—“ Use, reason and precedents do concur to prove the *chancery* to be a place appointed to receive the returns, as to keep them for the parliament, but not to judge of them: And the inconvenience might be great, if the *chancery* might, upon suggestion, or sheriff’s returns, send writs for new elections, and those not subject to examination in parliament: For, so, when fit men were chosen by the counties and boroughs, *the lord chancellor or the sheriff’s* might displace them, and send out new writs, until some were chosen to their liking.

OBJECTION 2. That we dealt in the cause with too much precipitation, not seemly for a council of gravity, and without respect to your most excellent majesty, who had desired the writ to be made: And being but half a body, and no court of record alone, refused conference with the lords, the other half, notwithstanding they prayed it of us.

OUR humble answer is, to the precipitation, That we entered into this cause, as in other parliaments of like cases hath been accustomed; calling to us the clerk of the crown, and viewing both the writs, and both the returns; which hath been warranted by continual usage among us.

CONCERNING our refusing conference with the lords, there was none desired, until after our sentence passed; and then we thought, That, *in a matter private to our own house*, which by rules of order, might not be by us revoked, we might, without any imputation, refuse to confer. Yet, understanding by their lordships, that your majesty had been informed against us, we made haste to lay open to your Majesty, the whole manner of our proceedings; *not doubting, though we were but part of a body, as to MAKE NEW LAWS, yet for any matter of privileges of our house, we ARE AND EVER HAVE BEEN, A COURT OF OURSELVES, of sufficient power, "to discern and determine, without their lordships, as "their lordships have used always to do for theirs, without us."*

IN return to this, the king replied, that he had seen and considered of the manner and the matter: He had heard his *judges* and his *council*; and that he was now *distracted in judgment*. Therefore, for his farther satisfaction, he desired and commanded, *as an absolute king*, that there might be a conference between the house and the judges.

THIS unexpected message occasioned great amazement in the house, but, at length, it was proposed to petition the king, that

he would be pleased to be present at the conference himself. This disputatious monarch gladly accepted the proposal, and said that he would be president himself.

At this conference, the king acknowledged, that the *house of commons* was a court of record, and a judge of returns. At length this conference produced a kind of compromise. It was agreed that both the members should be excluded, and that a new writ should issue ; to which the commons with difficulty consented, at *Goodwin's own particular desire*, expressed in a letter from him to the *Speaker* which was read before the question was put, and wherein he pressed the house to consent to the proposition, chusing rather to waive his right than be the occasion of a quarrel between the king and the commons.

NEVERTHELESS, many members were greatly dissatisfied even with this concession. It was said by one,—“ We lose more “ at a parliament, than we gain by a battle. The authority of the “ committee was only to fortify what was agreed on by the “ house for answer, and they had no authority to consent.”

IT was further urged by another, in these terms ;—“ We “ should proceed to take away our dissention, and preserve our “ liberties: We have exceeded our commission, and drawn up “ on ourselves, a note of inconstancy and levity.”

THUS we see, that, even in these spiritless days, when the sovereign exerted himself in the highest tone of prerogative, the commons boldly asserted the right of jurisdiction ; and the king perceived, by the temper and arguments of the house, that he had no prospect of becoming, as he intended, master of elections.

RAPIN very justly represents this attempt of the king's, as an evidence of his aiming at absolute power : And it may be added, that had he succeeded to his wish in this attempt, it would have enabled

enabled him to assume that *absolute power in fact*, which he arrogated in *words*.

No vestige, from this time, I believe, appears, where the exclusive jurisdiction of the house of commons, with respect to elections and matters incidental thereto, came in question, till just before the restoration, in the case of *Nevil against Stroud* ;* which was an action on the case brought in the common pleas, against the Defendant, as sheriff of *Berkshire*, for a false return. The record was delivered into parliament, and was afterwards, by order of parliament, adjourned into the exchequer chamber†, but was never determined. It was nevertheless strongly urged in this case, “ *That as it concerned parliamentary privilege, the common law could not intermeddle with it.*”

I THE rather mention this, because the courts of law adopted this opinion in cases I shall hereafter take notice of.

IN the year 1672, the commons were again under the necessity of asserting their jurisdiction. When the Earl of *Shaftsbury* was lord chancellor, writs issued, during a prorogation of parliament, for electing members in the room of those that were dead : The king himself was so cautious, as to the regulating of this proceeding, and had so much regard to the privileges of the house of commons, that, at the next session of parliament, 5th of February 1672, he spoke to the house of commons from the throne in these words :

“ ONE thing I forgot to mention, which happened during this prorogation ; I did give orders for the issuing some writs for the election of members, instead of those that are dead ; that the house might be full at their meeting : And I am mistaken, if this be not according to former precedents. But I desire you will not

* 2 Sid. 168.

† It was usual, about this time, for committees of the house of commons to meet in the exchequer chamber.

fall to other busness, till you have examined that particular; and, I doubt not, but precedents will justify what is done: I am as careful of all your privileges as of my own prerogative."

THE 6th of February 1672, the house of commons took the matter into consideration; and several precedents being cited, and the matter at large debated, and the general fense and opinion of the house being, that, during the continuance of the high court of parliament, the right and power of issuing writs for electing members to serve in this house, in such places as are vacant, is in this house, who are the proper judges also of elections and returns of their members.

THEREUPON it was *Resolved*, " That all elections, upon the " writs issued since the last session, are void: And that Mr. " Speaker do issue his warrant to the clerk of the crown, to make " out new writs for those places." Which was done accordingly.

NOT many years after, that is, in the 26 Car. 2. an attempt was made to encroach on the exclusive privilege of the house in matters of election, by endeavouring to establish a concurrent jurisdiction, in the case of *Barnardifan* against *Srame**.

THIS was an action on the case brought in the *king's-bench* against the defendant, as sheriff of Suffolk, for a double return. The election of the plaintiff had, upon examination in parliament, been judged good, and they had committed the defendant for making this double return. Nevertheless the jury found a verdict for the plaintiff, with 800*l.* damages.

IT was moved however in arrest of judgment, that the action did not lie; and, among other reasons, it was urged, " *That the falsity or verity of the return was only examinable in the house of commons,*

“ *mons, who are the SOLE JUDGES, and will punish such falsities, as they have done in the present case.*”

JUDGMENT however was given for the plaintiff.

LORD chief justice *Hale*, in this case bid all persons about him take notice, that, *they did not determine the right of election for the JUDGMENT in that case belonged to parliament*; but, he said, *since the house of commons have determined the right, he thought they might follow their judgment, to repair the plaintiff in damages.*

THIS judgment, nevertheless, was afterwards reversed in the exchequer chamber, by the opinion of chief justice *North*, and five other judges against two; the chief, with the five other judges, holding, that the action did not lie: And this judgment of reversal was afterwards affirmed in the house of lords*.

AFTER such a solemn reversal of the judgment of the *king's-bench*, and an affirmative of that reversal in the house of lords, it might have been expected that this point would never be moved again. Yet in the 33 Car. 2. it came again in dispute in the case of *Onslow* against *Rapley*†, which was an action on the case brought against the defendant as returning officer, for a double return, and a verdict thereupon for the plaintiff. But, upon motion in arrest of judgment, it was held clearly by the whole court, that the action did not lie. They were unanimous that *they had no jurisdiction of this matter*; and went so far as to say, “ That it would be great presumption in the court to meddle with elections to parliament, before the matter hath been determined in parliament.”

SOMETIMES after the resolution, in the 12 Wm. 3. ‡ a further attempt was made, in a case somewhat different from the last

* 1 Lutw. 89.

† 3 Lev. 29. 2 Vent. 37.

‡ I take no notice of the case of *Norris* against *Mawdit*, as that was an action for a false return, grounded on the stat. 23 A. 6. c. 15. and does not apply to the question under consideration. See 5 Mod. 511. Comb. 430.

last, to give the courts of law a concurrent jurisdiction with the house of commons.

THIS was in an action on the case brought in the *common pleas*, by *Prideaux* against *Morrice**, for a *false return*, before a determination in parliament, and the court were clearly of opinion that such an action did not lie.

IN this case, chief justice Trevor delivered the opinion of the court in the following words:

“ THAT this action would not lie before the election was determined in parliament *which was the proper court to determine this matter*. If it should lie, this inconvenience might follow, viz. The verdict might find contrary to what the parliament might hereafter determine, which is not to be allowed; for it is plain that, *if the parliament had determined against the plaintiff, could never afterwards have this action.*”

“ IT is true, in courts which have concurrent jurisdictions, there cannot be different judgments in one and the same case, because the determination must be in that court, which was first possessed of the cause, for if an action is brought for the same matter in one court, the party may plead in the abatement, that it is depending in another: and if judgment is given in the first action, then he may plead it in bar to the last.”

BUT, *in this case, there may be different judgments, BECAUSE THE COURT OF PARLIAMENT HAVE A SUPERIOR JURISDICTION IN THIS MATTER*†.

A

* 1 Lut. 82. Nelf. Lutw. 31. Salk. 502. Holt. 523. 8 St. Tr. 9.

† The report of this case in the French edition of Lutw. 89. is to the same effect: But the chief justice is there made to say further, “ *That the house are proper judges.*”

A WRIT of error was brought upon this judgment in the court of *king's-bench*, and the judgment was there affirmed.

NEVERTHELESS, such is the contentious spirit which has at all times attended the elections, and such the animosity with which each party opposes the other, that the exclusive right of jurisdiction of the commons, in these matters, did not long remain uncontroverted, but came again in question, in the famous case of *Abby* against *White*, and others*, in the 2d Ann.

THIS was an action upon the case brought against the defendants as constables of *Aylesbury* for refusing to receive his vote in the election of two burgesses for that borough. A verdict was found for the plaintiff, and it was afterwards moved in arrest of judgment, that the action was not maintainable; and it was held, by the opinion of three judges, against *Holt*, chief justice, that the action did not lie.

IN the end, however, this judgment was reversed, upon an appeal to the house of lords; and the judgment was given for the plaintiff.

BUT the commons warmly resented this attempt to destroy their independence†, and such violent disputes arose between the two houses, that it was judged proper to put an end to them by proroguing the parliament.

THE highest reverence, no doubt, is due to the judgment of that supreme court of judicature, the house of lords; but an insatiate appetite for power is natural to all bodies of men; and if the judgment of that august assembly may be presumed to have less authority in one case than another, it must certainly have the least

* Salk. 19. 3 Salk. 17. 6 Mod. 45 Holt. 524. 8 St. Tr. 89.

† They voted it a breach of the privilege, and committed all the parties concerned, lawyers, &c.

least weight in this, wherein their judgment directly tended to enlarge their own jurisdiction, and ultimately to give them a manifest ascendancy over the third estate in the kingdom, and consequently over the liberties of the people of Great-Britain.

IT must be premised likewise, that great deference is undoubtedly due to the opinion of that eminent chief justice, lord *Holt*; at the same time it must be acknowledged, that the three judges, from whom he differed, have ever been reputed among the most learned and able of the profession: And perhaps some of the arguments* of this great man, on this occasion, will be found to depend on those hair-breadth distinctions, which however they may shew the subtlety of argumentation, do not always tend to the establishment of truth.

IT is to be premised that it was agreed in this case that the burgesses, for whom the plaintiff tendered his vote, were elected. Nevertheless lord *Holt*, in giving his opinion, said, That it was not material, whether the candidate for whom he would have voted, be chosen or not.

IN this however, he seems to lose sight of the substantial merits of the question. For what is the *end* for which the *right* in *question* was established? No other than this: That certain persons *being duly qualified*, should have the privilege of electing whom they please, *being duly qualified likewise*, to represent them in the great council of the nation.

IF therefore the person for whom they tendered their vote, be received, the substantial *end*, for which the privilege was granted, is obtained; so that they cannot alledge any injury; and though their votes may have been rejected, yet they are not thereby

* In truth, the most material arguments urged by lord *Holt*, in this case, were strongly pressed before by Sir *Robert Atkins*, and over-ruled in the case of *Barnardiston* against *Soame*. See 7 St. T. S. 434 & sequent.

thereby deprived of their *right*. They may tender their votes on any other occasion, and there can be no danger, that, by the rejection of their votes by the returning officer at one time, any person, not of their choice, should, at any subsequent election, be chosen their representative: for it is at all times open to them to assert their right by petition to the house of commons, where, if well founded, it will be allowed and confirmed; and their votes, if necessary to give a majority to the candidate of their choice, will be added to the poll.

B U T, says lord Holt, “ by refusing the plaintiff’s vote he has an injury done him, for which he ought to have a remedy: Want of right and want of remedy are reciprocal. Wherever there is injury, it imports a damage. The parliament cannot judge of this injury, or give damages to the plaintiff.

T H A T the house of commons cannot give damages, *eo nomine*; as damages, may be admitted; but does it therefore follow, that they cannot judge of the injury, and give a remedy?

H I S lordship very properly flights the notion, that there can be no *damage* but a pecuniary one. But is it not equally exceptionable, to contend, that there can be no other kind of *remedy* but a pecuniary one?

U N D O U B T E D L Y there may; and the *remedy* is, to petition the house of commons, who will examine and determine the matter of *right*, and thereby judge of the *injury*, and punish the offender.

N O says his lordship; there can be no petition in this case. “ Was ever such a petition heard of in parliament, as that a man “ was hindered of giving his vote, and praying them to give “ him a remedy?”

M

To

To this it may be answered, That, as his lordship very properly observed, in this case, that it was no objection to the bringing the action, that no such action was ever brought before, so it might have been urged, that it could be no objection against the preferring of such a petition, had no such petition ever been preferred before.

As the house of commons, only, have competent jurisdiction with respect to the rights of election, so every invasion of those rights must, at all times, have been cognizable before them: It was urged, as to this point, by a member, in the course of the debate in the house of commons, that he had known petitions touching elections preferred by very few persons; by the same rule, said he, a petition may be presented by *one*: And in truth it appears from the journals of the house of commons, of the 31st of May 1628, that this doctrine was expressly laid down.

At that time, there was a question with respect to *Warwick*, whether the election should be made by the mayor and common council, or by the commoners in general. And a petition was produced, whereby above 200 commoners disclaimed to have any right of election. But the petition was refused, and the reason alledged, was, " because, if *one* commoner appear to sue for his " right, we will hear him."

AND in truth several petitions have, of later years, been presented, merely to ascertain the right of voting, where there was no question about the merits of the election.

IN the year 1711, which was soon after the case of *Ashby* against *White*, a petition was presented by *William Treene* and others, of the city of *Coventry*, complaining of their being debarred of their undoubted right of voting, and praying that their right of voting may be ascertained to them, and *reparation* made for the *injury* they have sustained in being denied the same.

THEY were heard by their council, and their right was established.

AGAIN, in 1723, a petition was preferred by *Charles Webb*, and others, of the borough of *Calne* in *Wilts*, complaining that their votes were refused at the last election.

THEY were heard by their council, who *admitted that the sitting members were duly elected, and justly returned*: so that the merits of election, it is seen, were not in contest, but the right of voting in the petitioners was, as an abstract proposition, the only question before the house. In the end, their right was disallowed.

IN 1724, another petition was presented from the inhabitants and house-keepers of the borough of *Honiton*, in the county of *Devon*, stating that they had, and enjoyed an undoubted right of voting, till 1711, when the house determined the right of election to be in the inhabitants paying scot and lot only: That there turning officers since that time, had received their votes; That the petitioners would have voted for the then sitting member, *had there been any poll*, and did desire to sign the return, but were refused as formerly: and prayed relief; which was granted them, by establishing their right.

FROM these instances, it appears that petitions have been preferred to parliament merely to substantiate the right of voting in the elector, as an abstract question, where there was no dispute whatever about the right of the elected, where there was no contest about the election, or the return, and, in the last instance above stated, *where there was no poll even*.

THERE is no room therefore for lord *Holt's* apprehensions, that there may be a right without a remedy: as the right concerns the parliament, so the remedy is to be had there only. They only can give the *specific thing* withheld: For should a

court of law recognize the right of voting, yet they cannot add the voter's name to the poll. The house only can restore him to the *specific right* which has been refused.

IT is too much to say that every injury imports damage. There are many cases where the law only gives the specific thing contended for, without damages, as in cases of *mandamus*, &c. Nay the common law paid so little attention to damages, that, in several instances, damages were not recoverable upon real actions; and costs were not recoverable in any cases whatever at common law.

BESIDES his lordship takes for granted the very thing in dispute, when he says, that by refusing the plaintiff's vote, he has an injury done him. For the *refusal* can be no injury, unless the *right of voting* be first established; and that, as has been shewn, the verdict of a jury cannot do. The house of commons only, are the competent judges of the rights of election, and the legality of votes. Their jurisdiction in these cases is part of the law of the land, which has been recognized by several acts of parliament*, declaring that "*such votes shall be deemed to be legal which have been so declared by the last determination in the house of commons, which last determination shall be final.*"

PERHAPS, indeed, after the right of voting has been determined in the house of commons, an action at law may, as was hinted by the other judges, be maintainable for the recovery of the costs, incurred in the prosecution of the right. But to contend that an action lies before such determination, is to introduce the inconvenience which lord *Trevor* so strongly insisted upon. For should an action be brought against a returning officer for refusing an elector's vote, this would not stop the proceedings of the house of commons upon a petition: And should a verdict be found by a jury, with damages against the returning officer for the

the refusal, and judgment be given thereon, the house might afterwards determine on the petition, that he had no right of voting, and might punish the officer for admitting his vote. So that on one hand, he might be punished by the court of law for refusing the defendant's vote; and he might be punished on the other hand, by the house of commons, for admitting it: which would be such a gross absurdity, and such a scandal to justice, as the laws of no country can be supposed to countenance, and which the laws of this country do not countenance; for, by the antient law of the land, recognizable by act of parliament, rights of this nature can only be determined in the house of commons.

A FARTHER attempt to give the courts of law a concurrent jurisdiction with the house of commons, with respect to elections, was made in the case of *Kendal* against *John* the 5th *Ann.*

THIS was an action in the case against the defendant for a false return: and after a verdict for the plaintiff, it was moved in arrest of judgment, that the action did not lie; and the judgment was arrested, by the unanimous opinion of the court, who held that no action would lie.

IN this case, among other arguments, it was urged, that the right in question was a *parliamentary right*; That the *remedy* therefore *must be parliamentary*, and could be had no where else but in parliament.

IT was said farther that THE COURT WOULD JUDICIALLY TAKE NOTICE OF THE LAW OF PARLIAMENT: that IT WAS THE LAW OF THE LAND: and according to lord *Coke*, OUGHT TO HAVE PRECEDENCY.

ANOTHER reason assigned why there was no cause of action was, *That the plaintiff had had the effect of his election*; that he

† Holt 629, &c. Fortesc. 104: And see the S. C. by the name of Coundell against John, Salk. 504.

he was returned, and had his place ; there was nothing remaining wherein he could pretend himself injured, but the costs he had been at in the prosecution, and as to them it ought to be supposed that the house considered them.

IN short, lord chief justice *Holt* himself, in delivering his opinion, said,—“ The proper remedy is in the house of commons ; “ and we cannot meddle with it ; but they can cause returns to “ be altered, and then they become the same as if the person was “ originally returned.”

THUS it appears, from the foregoing historical deduction, that every attempt which has been made to encroach on the exclusive jurisdiction of the house of commons, in matters of election, either with respect to electors or elected, has either dropped of itself, or been resolutely withheld and repelled by the house of commons ; who have constantly, as they did in the case of *Goodwin*, asserted and maintained this jurisdiction, as their COMMON RIGHT, which they derived from their ancestors.

As to their right of deciding with respect to the qualifications of the elected, that has not, in any of the cases, been disputed. Even Sir *Robert Atkins*, who in the case of *Barnardiston* against *Soame*, contended most strenuously for affirming the judgment, said, “ *We know that the house of commons is now possessed of the jurisdiction of determining all questions concerning the election of their own members, so far at least, as in order to their being admitted or excluded from sitting there.*”

NAY, in the case of *Ashby*, against *White*, neither lord *Holt*, nor any of the zealous whigs of those days, ventured to dispute that the jurisdiction of the house was fully competent, as to the seats of their own members. One of the lords, at a conference said, “ We do not meddle with the commons right to determine their own election ; they have a settled possession of it, which is a right.” So that the case of *Ashby* against *White*, though cited on

the other side, concludes strongly against the doctrine they labour to introduce.

NEVERTHELESS they contend, that the right of being elected is a *common law* right, of which no man can be deprived, but by act of parliament.

THIS, in the first place, is assuming a proposition for granted which may safely be denied. The right, as was said, in the cases above cited, is a *parliamentary right*, to be exercised only in parliament, and therefore cognizable there only, where the duty is to be executed.

BESIDES, none can say that, in the present instance, Mr. *Wilkes*'s right of being elected is taken away; for in truth it is only *suspended* during the existence of this parliament. When the body which expelled him is dissolved, his capacity of being elected revives. The incapacity is not perpetual, but only temporary. To make it perpetual, is what, in the better opinion perhaps, an act of parliament only can do. But the house of themselves can disqualify any member during that parliament. For let the right be a common law right, or a parliamentary right, yet, like other rights, it may be forfeited by crimes and misdemeanors, &c. And who should judge of those causes of forfeitures, but the body of which he is a member?

INDEED, the right of jurisdiction in the house of commons, in this respect, is so fully established by immemorial usage, that it cannot be disputed, without controverting the fundamental principles on which the law of the land depends. The house, as appears from their journals, have determined with respect to the qualifications of the *elected*, from time to time, down from the year 1553, to the present period: and it is by their *resolutions* only, that persons of various classes are at this day disqualified. It is by their resolutions, that—

1. CLERGYMEN are not eligible.

THE 12th October 1553, a committee was appointed to enquire about the right of *Alexander Newell* and *John Foster* to sit in the house: and the committee reported that Alexander Newell being prebendary of Westminster, and thereby having a voice in the convocation house, cannot be a member of this house: which was agreed by the house, and a writ was directed for another burges in his place.

WE find the like resolutions the 8th of February 1620, and the 17th January 1661, with respect to other clergymen.

2. Judges are not eligible.

“ THE 28th June 1604 it was moved by Sir Edward Hobbes, “ as a doubt to be resolved, whether if a member of this house “ be called to the place of a judge, or other *attendance above*, dur-“ ing the time of parliament, he ought to sit here during the “ same parliament.”—We do not find any resolution on this point, at that time. But on

THE 9th of November 1605, the committee having reported two members to be attendants as *judges* in the higher house, the question was put on the report, Whether they should be recalled? and the house *resolved*, That they should *not*.

ACCORDINGLY we meet with several passages in the journals, particularly the 11th April 1614, where the exclusion of the judges is spoken of as an established practice; and we see by daily experience, that whenever any members of the house of commons are appointed judges, new writs are issued for the election of others in their room: of which the numerous precedents are so notorious and recent, that it is needless to refer to them.

3. *Returning officers* are not eligible.

THE 25th June 1604, upon a motion of Mr. *Moore*, to know the opinion of the House, whether the Mayor of a town, &c. might lawfully be returned, and serve as a member?

THE House *resolved* and ordered, and the clerk of the House was commanded to enter it accordingly, that from and after the end of this present parliament, no mayor of any city, borough, or town corporate, should be elected, returned, or allowed to serve as a member of this house, and if it did appear that any member was returned a burges, that presently a new writ should be awarded, for the choice of another in the room and place of the said mayor.

THE 14th April 1614, upon a report of the committee, that Mr. *Berry*, bailiff of Ludlow, had returned himself,

THE house *resolved*, That he should be removed, and a new choice made:—And, *resolved* farther, That all mayors, and bailiffs, in the like case, should be removed.

ACCORDINGLY, 22d May 1621-2, we find, that a mayor being returned, he was removed, and a new writ ordered. And, on

THE 2d June 1685, The house resolved, That no mayor, bailiff, or other officer of a borough, who is the proper officer to whom the precept ought to be directed, is capable of being elected to serve in parliament for the same borough, if he be not a mayor, bailiff, or officer, at the time of the election.

4. *Aliens* are not eligible.

THE 28th May 1624, *resolved*, upon the question concerning the election of Mr. *Walter Stewart*, being no natural citizen of England, void: and a warrant to go for a new writ for Monmouth.

5. THE eldest sons of Scotch peers are not eligible.

THE 3d December 1708, A motion being made, and the question put, “ That the eldest sons of the peers of *Scotland* were capable, by the laws of Scotland at the time of the union, to elect or be elected as commissioners for shires or boroughs to the parliament of Scotland ; and therefore, by the treaty of union, are capable to elect or be elected to represent any shire or borough in *Scotland*, to sit in the house of commons in *Great-Britain* ; ”

IT passed in the *negative*. —

ACCORDINGLY, The 6th December 1708, a new writ was ordered in the room of lord *Haddo*, who, being the eldest son of a peer of that part of Great-Britain called Scotland, was declared incapable to sit in the house. And,

THE 18th November 1755, a new writ was ordered in the room of *Charles Douglas Esq*; commonly called lord Douglas, then become the eldest son of a peer of that part of Great-Britain called Scotland.

BESIDES these, which are permanent disqualifications of particular classes, the house have, in various other instances, determined and adjudged with respect to the qualifications of the elected. They have adjudged persons in *execution* not to be eligible.

THE 24th March 1625, it appearing to the house, that Sir *Thomas Moncke* was in *execution* before, and at the time of, his election, a writ was ordered to issue for a new choice in his room.

THE 22d March 1661, at the election for Leinster, the *poll* was denied to Mr. *Coningsby*, who was put in nomination for that borough ;

borough: but he being a prisoner in execution for debt*, and not *eligible*, it was adjudged, which is very observable, that the denying the poll to him *did not avoid the election*; and Mr. *Cornwall* and Mr. *Graham*, the other candidates, were duly elected.

THE 15th December 1689, on proof of *bribery* in the election for *Stockbridge*, the house *resolved*, that it was a void election: And resolved farther,

“ THAT William Montague, Esq; be disabled from being elected a burgess to serve, in this present parliament, for the borough of *Stockbridge*.”

THE 10th November 1707, *resolved*, That every person who by an act of the first session of the last parliament, intitled, “ An act for the better security of his majesty’s person and government, and of the succession of the crown of England in the Protestant Line,” is disabled, from and after the dissolution or determination of the said parliament, to sit or vote as a member of the house of commons in any parliament to be thereafter holden, is by virtue of the said act, incapable of sitting or voting, as a member of the house of commons in this present parliament.

THE 7th December 1708, *resolved*, That *Anthony Hammond*, Esq; being a commissioner in the navy, and employed in the out-ports, is thereby *incapable of being elected*, or voting as a member of this house.

• THE 9th June 1733, *resolved*, That the accepting a commission of governor or lieutenant-governor of any fort, citadel, or garrison, upon the military establishment of his majesty’s guards and garrisons of Great-Britain, by any member of the house, being

* The reason why a person in *execution* is not *eligible*, is obvious, because such an one is not bailable? consequently he cannot attend to discharge the duty of a representative: Whereas a person arrested on mesne process is admissible to bail.

ring an officer in the army, does not vacate the seat of such member.

Thus, even where the disqualification is by statute, the house is the only court where the statute can receive an exposition, or where any adjudication can be made.

But the following instance is of itself sufficient to prove, that the house are, and have been acknowledged to be, the proper and only judges concerning the qualifications of the elected. On

THE 19th November 1606, not many years after the case of Goodwin, the Speaker produced a note sent unto him, as he said by commandment of the lord chancellor, containing the names of certain members of the house, disposed and employed by his majesty since the last session in special services, with direction TO KNOW THE PLEASURE OF THE HOUSE, whether the same members to be continued, or their places supplied with others.

In this list are the names of Sir Thomas Ridgway, treasurer of war, and Sir Humphrey Winch, chief baron of Ireland, with others. And,

THE 22d November 1606, upon the report, warrants were ordered for the choice of new members in the places of Sir Thomas Ridgway, Humphrey Winch, &c.

Thus it appears from the foregoing precedents, that the house have of antient time exercised the sole right of determining the qualifications of the elected: And that this right has been recognized in one of the most arbitrary reigns, by referring to their pleasure, to determine, whether certain members should continue, or their places be supplied by others.

It appears likewise, that they have exercised the right of adjudging and declaring the incapacity of being elected, not only as expeditors of the written or statute law, but even where the law

law has been silent, they have adjudged persons incapable of being elected, from the particular circumstances of the case, and upon general principles of constitutional policy.

Thus, it has been shewn, that from immemorial usage, recognized and confirmed by the statute law of the realm, the house of commons have the sole right of judicature, in all matters respecting elections; and indeed, it is clear, upon the general principles of reason and the spirit of constitutional policy, that such a power ought to be vested in them, and them only, as essential to the security of public liberty.

THE constitution of the British government, being of a mixed nature, the house of commons are the body, whose peculiar duty it is, to vindicate the liberties of the people, against the encroachments either of the sovereign or of the nobles.

THE better to secure the popular interest, the commons are elective; and certain people, being qualified as the law directs, have, at stated times, the privilege of electing whom they please, *being likewise qualified by law*, to act as their representatives in parliament.

IF any doubt or dispute arises, in respect to the qualification either of electors or the elected, who does the constitution point out as the proper judges to decide in such cases? Most certainly, that body only, who are constituted as the representatives of the people, ought to determine, upon points which are so essential to the preservation of their liberties.

NO ONE will be extravagant enough to suppose, that the people at large, can exercise a judicial power of determining the law, with respect to their own qualifications, or the qualifications of their representatives: When the electors of a particular county or borough have made their election, they have executed their power; and should any doubt arise, either with respect to their qualifications, or the qualifications of the elected, they then are parties

parties interested in the question, and consequently cannot be judges. The question is then between them and the rest of the people; for every member, as has been said, though chosen for a particular place, serves for the whole nation.

NOTHING therefore can be more absurd, than to suppose that they should be judges in their own cause, and that their determination, in a matter wherein they are interested, and may therefore be presumed partial, should bind the whole community.

IT would be as absurd to contend, that any of the courts of Westminster, or any other judicature whatever, should be allowed to take cognizance of matters respecting the qualifications of electors or elected.

SHOULD any other court be admitted to a concurrent right of judicature in such cases, it would necessarily introduce a clashing of jurisdiction, and a contrariety of judgment.

BESIDES, as it has been shewn, that the electors of the particular county or borough, whose rights are in question, cannot judge of the matter in dispute, it would be highly ridiculous to imagine, that any 12 men of those electors, should have a power of determining in such case.

To contend for such a power in the courts of Westminster, is not only absurd, but it is highly dangerous. For—

As an appeal lies ultimately from the judgments of all the courts at Westminster, to the house of lords, the *Lords would become the ultimate judges with respect to the qualifications of electors and elected*, which would apparently give them such an ascendancy over the commons, as would ruin their independence, overthrow the balance which it has been the provident care of our forefathers to establish, and, in the end, destroy the rights and liberties of the people.

As this Power cannot, nor ought to be lodged in any of the courts at Westminster, so neither can it be in the king and council, or any where else, without being attended with the same inconveniences and dangers: It can therefore only reside in the general body of the people, by their representatives; that is, in the house of Commons: Which is, and by the constitution can only be, the general court of the people.

THE fatal effects of placing such a Power elsewhere, are obvious and certain. Therefore, no man, who is not an enemy to the constitution, would wish to see any other judicature interfere with that of the house of Commons. On the jurisdiction of that house, the liberties of this country depend. Our wise and spirited ancestors, in their address to *James the 1st*, declared, that "the privileges, liberties and jurisdiction of parliament, were the right and inheritance of the subject."*

As it has been shewn, that the house have, and ought to have, the sole jurisdiction over their own members, *as such*, that they may punish them by expulsion, &c. That they may declare and *adjudge*, who are, and who are not, capable of sitting in that House.—It will appear, 3dly, That they have exercised this right, with respect to the late election for Middlesex, in a legal and constitutional manner, not only strictly agreeable to the law and usage of parliament, but conformably to the proceedings of the courts of Justice in Westminster Hall, on similar occasions.

IT has been already stated, by extracts from the votes, that, upon Mr. Wilkes's being returned after his expulsion, the house *resolved*, That he *was, and is, incapable of being elected to serve in this present parliament.*

THEREFORE, admitting that his incapacity was not a *necessary consequence* of his expulsion, which the Freeholders were bound to

* See Rush. col. 53:

to take notice of, yet this *express* declaration of incapacity was such as *all the Freeholders of Great-Britain* were bound to take notice of. For this, which is but an exposition of their former resolutions, is the solemn adjudication of a *court of judicature*, on a subject wherein they have not only a competent, but the *sole jurisdiction*. It is therefore as binding, nay, being without appeal, it is, in its effect, more obligatory than a judgment of any of the courts of Westminster, to which every subject is bound to submit.

Now it is a known and established maxim, that every man is bound to take notice of the law. With what colour then can it be pretended, that the Freeholders of Middlesex had no notice of Mr. Wilkes's incapacity? Ignorance of the fact may, in some cases, be pleaded in excuse, but ignorance of the law never can.

In truth, however, it is notorious, that they were neither ignorant of the law, nor of the fact. The incapacity of the person they thought proper to elect, was, with scrupulous caution, set forth in the introductory part of the writ, which is always read publickly, previous to the election. Yet, even this caution, which takes away all pretence of want of notice to the freeholders, has been made the foundation of another objection.

IT has been objected, on the authority of Lord Coke, that the writ can receive no alteration, but by an act of parliament. No one will dispute this authority. But the clear answer to this objection is, that the writ, in reality, was not altered. The body, or directory part of the writ, did not vary a jot from the established form; but the introduction, which declares the cause of vacancy, must, in the nature of things, be varied according to the different causes which occasion the vacancy.

IF the vacancy is occasioned by the death of a member, it is said, in the room of such an one deceased: If it is occasioned by acceptance of an office, it is said, in the room of such an one, he having accepted such an office: If it is occasioned by the incapacity

city of the late member, it should say, in the room of such an one *incapable of being elected*. And in like manner with respect to other causes of vacancy.

IT is evident, therefore, that the Freeholders of Middlesex could neither be supposed ignorant of the fact, or of the law. Having elected a representative again and again, after a legal declaration of his incapacity, in contempt of the jurisdiction of the house, and in direct opposition to the law of the land, no presumption could be made in their favour. Such a flagrant misuser of their franchise, at least amounted to a non-user ; their votes must be considered as thrown away ; and the person next upon the poll, having the majority of legal votes, could only, in point of reason and law, be considered as duly elected.

HAD there been, in this case, no line chalked out to direct the determination of the house, yet the necessity of the occasion would have dictated such a decision, in order to maintain their own jurisdiction, on which the liberties of the people depend, against the contumacy of a set of mistaken persons, who were infligged to betray their own interests.

BUT though the reason and necessity of the case would have sufficiently justified the proceedings of the house, yet they did not act without precedent.

ON the 20th of May 1715, in the case of the election for the borough of Malden, the poll stood thus :

For Serjeant Comyns	215	Mr. Tuffnel	168
Mr. Bramston	215	Sir Will. Jollyffe	128

SERJEANT COMYNS having refused to take the oath of qualification, they *resolved* that his election was void. But what did they farther in this case? why they did not issue a new writ! But they considered the votes given for the serjeant as thrown away: And *resolved*, That Mr. Tuffnel, who had a lesser number of votes than the serjeant, was duly elected.

AGAIN, on the 14th of February 1727, and 16th of April 1728, in the case of the election for the town of Bedford, the poll stood thus :

For Mr. Ongley	-	465	Mr. Orlebar	-	243
Mr. Metcalfe	-	462	Mr. Brae	-	236

It appearing that Mr. Ongley held an office in the customs, and the 12 and 13 W. 3. c. 10. against officers in the customs sitting in parliament being read, and no surrender appearing to have been made of the said office, before the election, the house *resolved*, that Mr. Ongley was incapable of claiming to sit in parliament. Therefore, though he had the majority of votes, they considered those votes as thrown away: And *resolved* farther, that Mr. Metcalfe and Mr. Orlebar were duly elected, though Mr. Orlebar had a lesser number of votes than Mr. Ongley.

As it is always to be wished, that there should be a harmony and correspondence of judgment in the several courts of judicature throughout the kingdom, so, happily in the present instance, the adjudications of the courts of Westminster perfectly agree and correspond with the determinations of the House of Commons.

IN the case of the King against the Mayor and Aldermen of Bath, the 15 Geo. 2. Mr. Taylor brought a *mandamus* to be admitted and sworn into the office of one of the Aldermen of the city of Bath. To which it was returned, that he was not duly chosen; and upon that issue being joined, it was tried before Lord Chief Justice Lee.

It appeared at the trial, that by the charter of the corporation, the Aldermen are to be elected by the Mayor, Recorder and Aldermen, or the major part of them; but it was agreed that the presence of the Recorder was not necessary. It was given in evidence to the jury, that the whole number of electors were *thirty*, of whom *twenty-eight* were lawfully assembled for the election of

an Alderman :—That for this office ther^e were three candidates, Mr. *Bigges*, who had 14 votes, the said Mr. *Taylor* who had 13, and Mr. *Kingston*, who had one vote ; but that Mr. *Bigges*, was not duly qualified to be elected into this office, being neither a free-man of the corporation, nor an inhabitant of the city of *Bath*.

ONE Bish, and another witness, gave evidence that they made the objection to *Bigges*, at the time of the election ; and that the electors, at the time the candidates were proposed, discoursed among themselves about *Bigges*, as a person not qualified.

ON the other side, there was one witness who was present at the time, and denied that he heard any such notice given by Bish.

UPON the whole of this case, Lord Chief Justice Lee, one of the most cautious judges that ever presided in a court, and whose judgments are held in the highest esteem, gave the following direction to the jury.—

THAT if they were satisfied the electors had notice of this want of qualification in *Bigges*, that then the 13 votes for *Taylor* were to be looked upon as insufficient to determine the election in his favour ; and he told the jury, that if they thought the 14 had voted for a person, *whom they knew to be unqualified, at the time they voted for him, their votes must be considered as thrown away, and they were to be deemed as not voting at all, or as consenting to the election of Taylor* : For that their dissent could no way be regarded, because *their voting for a person not qualified was the same as if they had voted for a person not existing or dead* : And therefore they could not be considered as voting against Mr. *Taylor*, for *no man could vote against another, but by voting for somebody else*. So that, on the whole, he considered these 14 votes as flung away, and of no more avail than if they had not voted at all.

UPON this, the jury found a verdict for *Taylor* ; and a motion was afterwards made for a new trial.

ON shewing cause against the motion for a new trial, several laws were cited in support of Lord Lee's direction to the jury. Among others the case, of the *Queen* and *Hugh Boscarwen* was cited from a note of Mr. *Werg*'s, which was an information, in the nature of a *quo warranto*, against Mr. *Boscarwen*, to shew by what authority he exercised the office of one of the capital burgesses of *Truro*, in the county of Cornwall. It appeared on shewing cause, that Mr. *Boscarwen* had 10 votes, and that one Robert D—— had 10 likewise; but that no person was capable of being elected unless he was, at the time of the election, an inhabitant of the borough. Mr. *Boscarwen* had a house near the town, but was not an inhabitant of the town; and though the court might have granted the information against Mr. *Boscarwen*, on the foundation of an equality of votes, yet lord *Parker*, on making the rule absolute, said, " *He considered those 10 votes for the unqualified person as thrown away, and that the other person was duly elected*; from which the rest of the court did not dissent.

THE case of the *King* and *Withers*, likewise the 8th Geo. 2. while that eminent lawyer lord *Hardwicke* was chief justice, was cited. This was an information in the nature of a *quo warranto*, against one *Withers*, for taking upon him the office of one of the capital burgesses of W——.

IT appeared, on shewing cause, that by the antient usage of the borough, whenever there was a vacancy of a capital burgess, the Mayor had a right to nominate two persons, out of which two persons, and no other, the Mayor and burgesses chose one to fill the vacancy.

THE defendant *Withers* and another were nominated by the Mayor, pursuant to the custom. The defendant had five votes, and the other person nominated by the Mayor had but one. But there were six other burgesses who insisted to vote, and did vote, for a person not nominated by the Mayor. The Mayor, however, refused to take the poll for the person not nominated by him.

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THE court held, that *the six votes for the person not nominated by the Mayor were thrown away*, and on that foundation discharged the rule.

IN the end, upon the sound reasoning in lord Lee's direction, and the authority of these cases, the court were unanimous in refusing to grant a new trial.

BUT independent of these great authorities, it is clear upon the principles of common sense, that a vote given for a person disqualified cannot be a legal vote. For to constitute a legal vote two requisites are essential: 1. That there be a capacity in the elector giving the vote; and 2. That there should be a capacity in the candidate receiving it. Mr. Wilkes, therefore, having no capacity to receive the votes, they were clearly illegal, and must be considered as thrown away.

NAY, indeed, it has been admitted on the other side, that they were thrown away: for, on the question whether the foregoing elections of Mr. Wilkes were null and void, they were, without a division, determined to be null and void; which was, in fact, determining that the votes given for him were thrown away.

STILL it is answered, on the other side, that if they were not good votes *for* Mr. Wilkes, they were nevertheless good votes *against* Mr. Lutterell.

ON any other occasion one might be ashamed to mispend time in answering such futile objections. Did ever any one hear of votes having a *negative* quality? Suppose, on Mr. Lutterell's being proposed, a number of electors had cried out, No! could a *negative* of this kind be considered as a vote against him? Certainly not. There is no way, as was said by lord Lee, of voting *against* a person, but by voting *for* some other: and if a number of electors might put a negative upon a candidate in such a manner

ner, they might keep a seat in parliament vacant as long as they pleased ; whereby they might deprive not only their fellow electors, but the state, of the assistance of a member.

IT is contended, however, that admitting these votes not to be good, yet the election should have been declared void, and Mr. Lutterell should not have been received. To prove this, they say it has been held that the voting for a person under age, who had a majority, did not make the next person elected, who had the minority.

To this it may be answered, That every case must depend on its own circumstances. Where indeed the incapacity is of such a nature as can only be ascertained by evidence, there, tho' the candidate having the majority should appear to have been ineligible, yet perhaps his competitor, having the minority, should not be received ; but the election should be declared void. Because it may be presumed, that had the incapacity been previously known, the majority might have made choice of some other person.

THUS, in the case of a minor, if such a candidate be so near being of age, that no man can, upon view of his person, determine whether he be of age or not, and if no certificate, or other proof of his minority, be produced in a case of such uncertainty, it would perhaps be too much to say that the votes for him were thrown away, and that the next candidate should be admitted.

BUT if in this case any certificate, or other good evidence of his minority, be produced, or if a candidate be so young, that his minority is notorious and apparent, in these cases the votes should be considered as thrown away, and the next candidate should be received.

THE true criterion of distinction is, whether the incapacity be or be not notorious of itself, and if not notorious of itself, whether there was, or was not notice of it? If it be notorious of itself,

self, or if it appear that the electors had notice of it, in either case it must be considered as an obstinacy and contumacy in the electors, to vote for a disqualified person; their votes, therefore must be deemed as thrown away, and then the next candidate should be received.

The house of Commons therefore, in such cases will use their discretion; and if they are satisfied upon evidence, that the electors had notice of the incapacity of the disqualified person at the time they voted for him, they will reject their votes; and if there be any other candidate, though with a lesser number of votes, they will, as has been done in the cases above cited, admit him.

But it is said on the other side, that in the case of Mr. *Walpole*, who was returned after he was expelled, the house did not receive Mr. *Taylor*, the other candidate, but declared the election void.

That is; but this case is by no means applicable to that of the Middlesex election. For though Mr. Walpole was returned after expulsion, and though, as has been contended, the incapacity was the necessary effect of the expulsion, yet in as much as this was the first and only instance in which the electors of any county or borough had returned a person expelled to serve in the same parliament, and the electors might be presumed not to have due notice of the effect of expulsion, the House gave them an opportunity to correct their error, by giving express notice, and by resolving, that he was thereby incapable of being elected, and at the same time declaring the election void.

It may be said, indeed, that by their voting for a person ineligible, a right attached, by operation of law, in Mr. *Taylor*. But a right of this kind in an individual, standing in competition with the rights of so many electors, and the law, with regard to the effect of expulsion, having never been before declared, it was proper and just in the House to give the electors, who had voted

voted for an incapable candidate, an opportunity of making a new choice, after the law creating the incapacity had been expounded.

BUT this their resolution leaves no room to doubt what part they would have taken, if, upon a subsequent re-election of Mr. Walpole, there had been any other candidate in competition with him. For, by their vote, they could have no other intention than to admit such other candidate; otherwise their vote would amount to a resolution that the seat should remain vacant during that parliament.

BUT how unlike to this is the present case! In the present case, the House, with the same moderation, explained the effect of the expulsion, by declaring that Mr. Wilkes *was* thereby *incapable* of being elected. Still, however, after the fullest notice, after he had been again and again declared incapable of being elected, they obstinately persisted in choosing him.

THEREFORE, as there was not the least colour for presuming that they had not notice of his incapacity, and as Mr. Lutterell stood next upon the poll, the House could not, without injustice to him, without betraying their own jurisdiction, without violating the precedents of parliament, and the corresponding determinations of the courts at Westminster; in short, without opposing the principles both of reason and law, they could not act otherwise than they did.

IN truth, there was no alternative but to admit Mr. Lutterell, or to refuse issuing a new writ. To have rejected Mr. Lutterell, after the law in such cases had been expounded, would have been to have denied him his right: To have refused issuing a new writ, would have been a violation of the rights of the Free-holders. By arbitrarily keeping seats vacant, the House may be purged, as in Oliver's time, to any degree a minister thinks proper: And this mode of proceeding, which some pretended patriots affect to prefer, would have been, as has been said, not only

only unjust with regard to Mr. *Lutterell*, but dangerous and unconstitutional with respect to the people.

NEVERTHELESS it is pretended on the other side, that tho' the rejecting the person returned, and receiving the other candidate, might have been right, had the person rejected been disqualifid by act of parliament, yet it is otherwise, as he is disqualifid only by the judgment of the House. By this means, they contend, the franchises of the electors are taken away, which nothing but an act of parliament can do; for that the House, being but one of the three branches of the legislature, cannot make laws to bind the people; and that though their orders and resolutions are binding upon themselves, yet they do not operate without doors.

In answer to this, it is to be observed, that though the house of Commons in their *legislative* capacity, as one only of the three branches of the legislature, cannot, as has been said, *make* laws to bind the people, yet it is to be remembered, as was stated in the beginning, that they have a *judicial*, as well as a *legislative* capacity, and it is in their *judicial* capacity that they take cognizance of elections. Considered therefore as a *court of judicature*, their adjudications are as obligatory as the judgment of any other court whatever; nay, more so, as has been intimated, because they are without appeal.

To shew, however, that the judgments of parliament are not binding without doors, they are extravagant enough, on the other side, to cite the case of the king and queen against *Knollys**, commonly called *Lord Banbury's* case, which was shortly thus:

CHARLES KNOLLYS, earl of Banbury, was indicted for the murder of Capt. *Lawson*, by the name of *Charles Knollys*, Esq; and this indictment was removed into the *King's Bench*, where

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* Salk. 47, 509, 512. 3 Salk. 242. Carth. 297. Comb. 273. - Skin. 336, 517. Caf. P. R. 55; Holt 530.

the defendant pleaded in abatement, that he was a Peer. To which it was replied, that the defendant had *petitioned* the lords in parliament, to be tried by his peers; upon which the lords, by an order of their House, disallowed his peerage, and dismissed the petition. To this replication there was a demurrer, and a joinder in demurrer. Notwithstanding this order of the Lords, however, judgment was given for the defendant, and the indictment abated.

But the grounds on which the court rested their opinion, as expressed by lord Holt, was that the *order* of the lords was not a *any* determination, for that the cause was not properly before them: It was not properly before them, because the petition was preferred to the lords, in *the first instance*, whereas it should have been preferred to the King, and from his Majesty have been referred to the consideration of the lords: So that the petition to the lords, was *coram non judice*.

This case, therefore, is not applicable to the case in question in any point whatever. For, in Lord Banbury's case, the reason, it is seen, which influenced the court, was, that the proceeding coming irregularly before the house of Lords, their order thereon was not a *judgment* of the House. From whence it is to be inferred, that if, in this case, the lords had acted judicially, in a matter regularly laid before them, the court would, and they certainly must, have taken notice of their *judgment*. But, in the present case, the house of Commons acted as a *court of judicature*, in a cause regularly before them; their declaration therefore was the adjudication of the court; and the adjudication of a court having competent jurisdiction, more especially of a court without appeal, is the *law of the land*.

IT has already been observed that there are in this kingdom, as in most others, divers laws for the administration of government.

WILL any one say, that the *common-law* is not as binding as the statute law? that the *customs of particular places* are not of equal force with the statute law? And will any one say, that the *law of parliament* is of less force and efficacy than the statute law? Are not all equally the *law of the land*? And does not the jurisdiction of the house of Commons, in matters of election, stand upon as firm a footing as the jurisdiction of any other court in the Kingdom? nay, has it not been recognized again and again by the statute law?

IF it be asked when, and how they acquired this jurisdiction; the answer is, That they gained it at the same time, and by the same means that they gained their right of impeaching the greatest personages in the land; at the same time, and by the same means, that they acquired the right they exercise with regard to money bills, and other undoubted privileges. In short, their jurisdiction in this respect, which is confirmed by immemorial usage, is as antient as the *common law*, and must be so deemed, for no written law can be produced which shews the commencement of the institution: It is coeval with the constitution, and without such a jurisdiction the house of Commons, as has been shewn, could not exist as an independent body: And if this jurisdiction is questioned, all their other privileges may, on as good a foundation, be disputed; since these, *together with many privileges of the other House*, can only be supported by immemorial usage.

As to the pretence that the House, by the exercise of this jurisdiction, have taken away the franchises of the electors, which nothing but an act of parliament can do, this insinuation is altogether fallacious.

Is the prohibiting of them from exercising their franchise against law the same thing as depriving them of it? Is it not necessarily understood in the exercise of every franchise, that it shall not be used contrary to the rules of law!

IN the present instance, they exercised it so clearly contrary to the rules and reason of the law, that, independent of the declaration of incapacity by the House, the sheriff might, on the authority of the case of *Leinster*, above cited, have even *refused to have taken any poll* for Mr. *Wilkes*, and even that would not have avoided the election; but any other candidate, having a majority of legal votes, would have been duly elected.

BUT how does the determination of the House deprive the electors of their franchise? No one disputes their right: All that is contended is, that they have exercised their *right INEFFECTUALLY*. Their right, as has been said, is to vote for whom they please, *being duly qualified*, to represent them. But they have wilfully and obstinately, with their eyes and ears open, voted for one disqualified, and of whose incapacity they were not only bound by law to take notice, but of which notice was actually and repeatedly given them.

THEIR votes therefore, on this occasion, must be considered, as not given at all. But still, though, in strictness of law perhaps, a wilful misuser of a franchise is a cause of forfeiture, yet no one contends that their franchise is hereby forfeited. No one means to take away their franchise: They have still the right of voting, on any future occasion, for whom they please, being duly qualified. But surely no one will contend that the electors of Middlesex are above the law; and that their will is to overrule the sense of the people at large, declared by their representatives.

BUT it has been said, and an obsolete act of Hen. the 4th has been cited, which declares, that " all elections shall be free without being interrupted by the Pope, or by commandment of the King;" much less, say the objectors, ought elections to be interrupted by a commandment of the House of Commons.

ONE would suspect, by the levity of such arguments, that they

they who use them really meant to betray the cause which they affect to support. That elections should be free, no one will dispute; but the freedom here spoken of is a freedom limited by law. — That the *Pope* should interfere with elections, we have no reason to fear: as little reason have we to apprehend, that our sovereign will interrupt the free course of elections. Nevertheless it was provident in our forefathers to declare any commandment of the king to be illegal; for should a commandment of that kind be admitted, it would directly tend to destroy the independence of the house of Commons; *so would the influence of any other power whatever.* But the objectors are to learn, that the *resolution*, or the *commandment*, if they chuse to call it so, of the house of Commons, is not against law, but declaratory of the law of the land. They are the proper and sole judicature, entrusted with the exposition of the law in such cases.

WHEN the jurisdiction of the House, however, can no longer be disputed, attempts are made to alarm us with the dreadful consequences, which, as some affect to apprehend, may ensue from it. At this rate, say they, the house of Commons may declare that no freeholder under 10*l. per annum* shall vote at an election for a knight of the shire.

IF they were serious in this apprehension, it might easily be removed, by assuring them that the stat. of Hen. the VIth having fixed the qualification of the freeholders at 40*s. per annum*, it is not in the power of the house of Commons, nor of any judicature whatsoever, to alter it: The *legislature* only can enlarge or diminish the qualification.

THERE must, in all cases, ultimately be a power of judicature somewhere, without appeal; and wherever the constitution has thought proper to vest it, it is not supposed that it will, or ever can, be exercised against the express letter of the law.

UPON the whole, whether the jurisdiction of the House, with respect to elections, be examined on the foundation of parliamentary

liamentary precedents and authorities of law, or on the general grounds of reason and constitutional policy, it is evident that they have, and ought to have, the sole and exclusive right of judicature in all such cases: that it cannot, consistent with the preservation of public liberty, be lodged any where else; and that, in the instance in question, they have exercised this right not only according to the established law and usage of parliament, but in conformity with the adjudications of the courts at Westminster, on the like occasions.

IT is scarce to be credited, that in these days, which we boast of as enlightened, the public should be so far misled as to question the exercise of a jurisdiction, on which their own welfare and security depends.

BUT what shall be said of those, who have employed every artifice thus to mislead and irritate the minds of the public, and who industriously augment the difficulties of administration, by obliging the ministry to pay that attention to their interested opposition which might be better employed in improvements for the public good!

IF lord *Coke* had reason to lament that " much time was spent in parliament concerning the right of elections, &c. which might be more properly employed for the public good,"* how would he have lamented, had he lived in these days, to have seen *one election* only consume so considerable a portion of a long session of parliament; and to have known, that this deplorable waste of time was occasioned by the opposition of a party, who laboured to force a member upon parliament *against law*, whom they themselves had caused to be expelled!

WHAT fruits are to be expected from such a flagrant inconstancy of conduct!

HOWEVER strongly such a party may be united at present, by a common interest, the pursuit of profit and power, yet when they come to a distribution of that power and that profit, how soon would they divide! Their different views, dispositions and passions would quickly set them at variance; new factions would be formed; new discords would arise; and the public interest be sacrificed to private views and resentments.

THESE consequences are obvious to the discerning and dispassionate part of the people, who unhappily for the affairs of mankind seldom compose a majority.

IT is to be hoped, however, that, before it is too late, the public judgment will be corrected. They will then find, that the persons whom they have been persuaded to consider as the invaders of their rights, are in truth the assertors and protectors of those rights; and they will then know in what estimation to hold those, who, by every unwarrantable artifice, have laboured to inflame their minds with representations of imaginary grievances, at the very time that, by a selfish opposition, they were entailing real misery upon them and their posterity.

F I N I S.

L E T T E R S

To THE HONOURABLE

Mr. Justice BLACKSTONE,

C O N C E R N I N G

His EXPOSITION of the ACT of TOLERATION,

A N D

Some POSITIONS relative to RELIGIOUS LIBERTY,

I N H I S CELEBRATED

COMMENTARIES ON THE LAWS OF ENGLAND.

By PHILIP FURNEAUX, D. D.

The SECOND EDITION with ADDITIONS,

A N D

An APPENDIX, containing AUTHENTIC COPIES of the Argument of the late Honourable Mr. Justice FOSTER in the Court of Judges Delegates, and of the SPEECH of the Right Honourable Lord MANSFIELD in the House of LORDS, in the Cause between the CITY of LONDON and the DISSENTERS.

A M E R I C A:

PRINTED FOR THE SUBSCRIBERS,
By ROBERT BELL, at the late UNION LIBRARY, in Third-street,
PHILADELPHIA. M DCC LXXIII.

THE

P R E F A C E

TO THE

SECOND EDITION.

IN publishing the following letters to the Honourable Mr. Justice Blackstone, containing observations on some parts of his Commentaries on the Laws of England, my design was, not only to induce the learned Commentator to reconsider several passages of his celebrated work, which, as I thought, were injurious to the interests of religious liberty ; but to promote amongst my readers in general just conceptions of the right of private judgment, and of impartial liberty in matters of conscience ; which of all human rights seems to me to be one of the most sacred and unalienable. How far I have succeeded in either of these views, it becomes not me to suggest. The worthy Commentator, indeed, in a new edition of his work, hath made very considerable alterations in the most obnoxious passages on which I had remarked : however, I will not assert, that the conviction which produced these amendments, was owing to my performance, in as much as the honourable gentleman hath not given me authority to assert it. But whether these corrections are to be ascribed solely to his own reflections, or in part at least, to the suggestions and reasonings of any other person ; in either case they are a noble sacrifice to truth, which whoever doth not greatly admire and applaud, must, I think, be destitute of every spark of ingenuity and candour. I am bound in honour and

justice to the learned gentleman, to point out distinctly in this edition of my letters, the particular corrections he hath made, of those passages which I had considered. Thus the reader will know, how far we are now agreed, and in what points we still differ; and will consider me in the former case, as not now writing against Mr. Justice Blackstone; but against any other person who may happen to hold, or advance, the sentiments which he before seemed to espouse.

THERE are still some material questions between us; in particular, with respect to the act of Toleration, as to which I cannot perceive the learned judge hath at all altered his sentiments. I observed in my first letter, that I never should have argued this point with a person of his uncommon acquaintance with the laws of England, if I had not known the opinion I had formed, had been agreeable to the declared sentiments of those who either have been, or now are, the ornaments of the highest stations in the law; and to the most solemn judicial decisions. I think myself, therefore, singularly happy in the opportunity of publishing authentic copies of the argument of the late Mr. Justice Foster delivered in the court of Commissioners Delegates, and of the celebrated speech of Lord Mansfield in the House of Lords, in the sheriff's case; a speech, which in point of arrangement, weight of argument, perspicuity and energy both of expression and sentiment, hath seldom, I believe, been equalled on any occasion, unless by the noble lord himself. And I here make my most humble and grateful acknowledgments to that truly great man, for the peculiar honour he hath done me, in permitting me to convey to the world a copy of that admirable model of juridical and senatorial eloquence.

MENTIONED in the former edition of my letters having in my possession a copy, which by many very competent judges, who were present when the speech was delivered, and some of them members of the supreme court by which the cause was determined, was thought to be not inaccurate: an imperfect trans-

transcript of which having, entirely without my knowledge, appeared in an evening paper, I was desirous, if I could obtain his lordship's permission, to favour the world with a more faithful copy. I accordingly waited on his lordship, and had my request in the most condescending manner granted. Indeed his lordship, when he delivered that incomparable speech, had no notes, and had afterwards taken no memorandums; but having read the copy, he declared his approbation of it: and it is accordingly printed in the Appendix, by permission.

MY learned and worthy friend Mr. Dodson will likewise accept my particular thanks for communicating to me in the most obliging manner, the original of his late uncle the Hon. Mr. Justice Foster's very accurate and masterly argument.

THESE excellent performances, thus authenticated, may be quoted as authorities: and they are such authorities as will be respected by the bench and the bar, as long as sound reason, accurate law, and impartial justice shall have their proper weight with either.

T H E

P R E F A C E

T O T H E

F I R S T E D I T I O N.

PERSECUTION is unwarrantable in any cause; yet it may most naturally be expected in favour of a bad one. I do not much wonder, therefore, that the church of Rome hath recourse to it in support of her manifold corruptions and usurpations. But that Protestants should have imitated her in this greatest of all her enormities, and have thereby imprudently given a sanction to her cruel treatment of themselves, is astonishing. Nevertheless, that it is true, the history of our own country abundantly testifies.

At the beginning of the reformation, in the reign of Elizabeth, several who had been persecuted in the preceding reign, the queen herself not excepted, discovered very intolerant principles, and made no scruple to persecute those who differed from them. Very oppressive and sanguinary laws were enacted against the puritans, and all nonconformists to the ecclesiastical establishment. In the subsequent reigns of the male line of Stuart, such laws were greatly multiplied, and the most severe and violent measures pursued, to accomplish that Utopian scheme, an ecclesiastical uniformity. Immediately upon the revolution, the great Mr. Locke pleaded, with a clearness and strength peculiar to

to himself, the cause of universal and impartial liberty of conscience in his celebrated letters on Toleration*. Sensible and enlarged minds quickly felt the force of his argument. But it required time for the most perspicuous and cogent reasonings, to eradicate general prejudices, and to alter the sentiments and complexion of the public. For not only in the beginning of the reign of our glorious deliverer king William, when the Toleration was enacted, were the views of the legislature so confined, that it was clogged with exceptions against heretics; but upon them, as well as infidels, very severe penalties were afterwards inflicted in the same reign, by a particular statute. This, I am
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* The Toleration-act received the Royal Assent May 24, 1689, and the sixth of June following Mr. Locke, writing to Mr. Limborch, thanks him for sending over the copies of the Latin letter concerning Toleration, which was printed in Holland; where indeed it had been written during his retirement in the year 1685, as we are informed by the author of his life prefixed to the folio edition of his works; and it was probably now published with a view to promote the Act of Toleration. The copies which were not bound, he saith, were not yet come to hand; and those which were bound, and which were come to hand, were probably intended for presents, and might arrive time enough to be dispersed amongst the principal members of both houses during their debates upon the Toleration-act: especially as it appears, they had been arrived some considerable time, by his saying, that he understood there was a person now employed (aliquem Anglum jamjam occupatum intelligo) in translating the letter into English. I have been the more particular in this account, because it hath been said, that Mr. Locke's letter upon Toleration could not possibly have any influence on the Toleration-act; which the form of expression in the next sentence but one in the former edition implied it might. It is now so altered as to be consistent with either supposition.

Mr. Locke's sentiments concerning the imperfection of the Act of Toleration he thus elegantly expresses in the same letter to Mr. Limborch: It is framed, saith he, non è forsan latudine, quâ tu et tui similes, veri et fine ambitione vel invidiâ Christiani, optarent. Sed aliquid est prodire tenus. His inititis jacta spero sunt libertatis et pacis fundamenta, quibus stabilienda olim erit Christi ecclesia: not with that latitude perhaps, which you, and such as you, who are genuine Christians, void of all ambitious and party views, would wish. It is something, however, to advance thus far; for by such beginning those foundations of liberty and peace are, I hope laid, on which the church of Christ will come in some future time to be established.

persuaded, was not at all owing to the king, who seems to have had more generous sentiments of men's religious rights; but to the blind zeal of the times, and to the high principles of some leading men in convocation and parliament.

HOWEVER, the sentiments and temper of the nation have been since greatly meliorated, especially under the mild administration of the Princes of the house of Hanover; to which happy reform no one contributed more than that admirable second to Mr. Locke, the late bishop of Winchester*, by his excellent writings in defence of religious as well as civil liberty. In so much that persecution having been discouraged by the civil power, and now become a stranger amongst us, the generality of people, no doubt, imagine, that this hideous monster hath no more countenance in the laws of their country than in the spirit of the times. The truth is, the legal state of religious liberty in these Kingdoms is very little understood. Men naturally presume, that, in this free and enlightened age, the rights of conscience, especially as they see them possessed without restraint or molestation, have the same legal security with their civil rights. It will perhaps surprize many of my readers, if they are unacquainted with the laws of their country, or have not read the late excellent Commentaries upon them, to hear that Deists and Arians, if they declare their sentiments, are by law incapable of holding any offices or places of trust, bringing any action, being guardians, executors, legatees, or purchasers of lands, and are to suffer three years imprisonment without bail:— that to revile, or even openly to speak in derogation of the common prayer, renders a man liable to a fine of an hundred marks for the first offence, to one of four hundred for the second, and for the third, to a forfeiture of all his goods and chattels, and imprisonment for life: and that the Toleration-act itself is so limited, that many who are commonly thought to enjoy under it, deservedly, every security which the law can give them, are yet subject to very

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* Dr. Hoadley.

vere and heavy inflictions, to their utter ruin, as the law now stands:—And as for those comprehended within that act; if according to the opinion of some lawyers, they are only exempted by it from the penalties of certain laws, and are not restored to a legal consideration and capacity; upon this idea, I say, they lie open to such inequalities and oppressions, that, were advantage taken of them, their very enemies would hardly wish their situation to be more deplorable. However this confined exposition of the Toleration-act, though still maintained, it seems, by some of the profession, hath been happily condemned by most of the judges, and is inconsistent with those grounds, on which was founded, in a particular case, a solemn judgment of the supreme court of judicature. And under this discouragement it will never again, I trust, obtain the countenance of any court of law.

HOWEVER that be, there are several persecuting statutes, those which I have mentioned and some others, which I think, were a reproach to the times when they were enacted, and are much more so to the boasted freedom and liberality of sentiment of the present age, which suffers them to continue unrepealed.

LET me only ask any friend of civil liberty, what, would be his reflections, if he had no security for the possession of his rights and privileges in the laws and constitution of his country, but held them only through the moderation of his superiors, or the spirit of the times? I believe, he would be extremely uneasy, till they were fixed on a legal basis; extremely attentive to the sentiments and conduct of those who, from their abilities, or their rank and station, might probably obstruct or promote so desirable a settlement; and those who, in any critical juncture, would be likely to act in opposition to the cause of liberty, would certainly be the objects of his jealousy, if not of his aversion. Now let every such friend of the civil rights of his country, whatever be his own religious opinions, and however secure he may himself be in his religious profession under the protection of

of the law, consider the case of those who are obnoxious to such penal statutes, as being still in force, may possibly be employed (and he can never be sure they will not be employed) as instruments of persecution and oppression. Every generous mind will make the interest of others, in such cases, his own ; and will be far from palliating or excusing, much more from defending, such laws as are incompatible with equity and humanity, and which, by those who would be thought friends of religious liberty, should never be mentioned but with disapprobation and censure. What part the ingenious and learned Commentator on the Laws of England, to whom the following Letters are addressed, hath taken, when he is considering some of those statutes to which I refer, is not for me to say : the public, as it is fit it should, will judge.

No laws which are unjust, and inconsistent with that religious liberty which it is right the inhabitants of these kingdoms should enjoy, (and I apprehend that which they do enjoy, it is generally thought right they should, because they have now enjoyed it for many years unmolested); I say, no laws which are indefensible, and incompatible with the rights of conscience, should be suffered to remain unrepaled. For if it be proper, that such rights should be possessed in the extent in which they are through the lenity of the times, it is proper there should be a legal security for the possession of them ; that they may not be trampled upon through the possible caprices of men in power, or some unaccountable turn in the sentiments of the public. And though I would not be understood to insinuate, that there is at present any likelihood of such an infringement ; yet the rights of human nature, (and religious liberty in its full extent is one of these) should never lie at the mercy of any ; but on the contrary, should have every protection and ground of security, which law, and the policy of free states, can give them.

I F any one say, It is right to keep a rod *in terrorem*, though it

it would be injustice or inhumanity to use it: I shall be apt to suspect, that, notwithstanding his fair pretences, when a proper opportunity offers, he will not fail to use it. For I am sure, if, in the concerns of religion, human *terror* be a proper motive, human *punishment* is equally so.

ADVERTISMENT to the FIRST EDITION.

THE following Letters were nearly printed off, before the Gentleman, to whom they are addressed, was appointed to the high station which he now fills in the law. This is mentioned as an apology for a form of address which the reader will perceive is not suitable to his present character.

L E T T E R S

TO

WILLIAM BLACKSTONE, Esq;

L E T T E R I.

SIR,

YOUR candour, I doubt not, will readily excuse an admirer of your excellent Commentaries on the Laws of England; if, from a desire of their being rendered still more excellent than they are, he gives you an opportunity of reviewing some passages, which, to him at least, appear to be exceptionable; and not so judicious and accurate, as other parts of your truly admirable performance. It were to be wished, that a work, so nearly perfect, were *omnibus numeris absolutum*.

My profession, Sir, is not that of the law; and if it were, it would be with diffidence, at least with much deference, I should make remarks on the composition of so great a master. The point, however, which I have in view, not only is of great importance to myself, amongst others, who dissent from the established church; but some cases of a public nature, which have come under my observation, have given me frequent occasion to consider it with no small attention. Nevertheless, if I had not found my own sentiments authorized and supported by their congruity to the declared opinion of persons of the most accurate and comprehensive acquaintance with the laws of England, and by those general grounds and reasons, on which the

most

most solemn judgments have been given; I should hardly have presumed to offer to you, and to the public, the following observations.

I REMEMBER, when some years ago, I read your Analysis of the Laws of England, and observed, that, in the third chapter of the fourth book, under the head of offences against the established church, you mentioned "Nonconformity to its worship—through Protestant dissenting;" and added "Penalty: suspended by the toleration-act:" I then imagined that your sentiments of the intent and influence of that act, and of the state and condition of the Dissenters under it, were confined and narrow. However, I flattered myself, that, when you came to consider the matter more thoroughly in your larger work, you would see reason to represent the case of the dissenters somewhat differently; and do it, as I think, more justice.

BUT in the fourth volume of your Commentaries, chapter the fourth, p. 53. I am sorry to find the following passage: "The penalties (*viz.* those which are laid upon the Dissenters by abundance of statutes, in particular by * 35 Eliz. c. 1. 17 Car. II. c. 2. 22 Car. II. c. 1.) are all of them suspended by the statute 1 Will. & Mar. stat. 2. c. 18 †, commonly called the Toleration-act, which exempts all Dissenters (except Papists, and such as deny the Trinity) from all penal laws relating to religion, provided they take the oaths of allegiance and supremacy, and subscribe the declaration against Popery, and repair to some congregation, registered in the bishop's court or at the sessions, the doors whereof must be always open: and dissenting

* In the new edition is inserted, " 23 Eliz. c. 1." There are several other statutes, which should have been mentioned; and above all, (for a reason which will be hereafter assigned) 1 Eliz. c. 2. §. 2. & 14.

† In the new edition is here added the title of the act; namely, " for exempting their majesties protestant subjects, dissenting from the church of England, from the penalties of certain laws."

‡ Added in the last edition, (" or make a similar affirmation being quakers.")

“ senting teachers are also to subscribe the thirty-nine articles, “ except those relating to church government and infant baptism. Thus are all persons, who will approve themselves no “ Papists or oppugners of the Trinity, left at full liberty to act “ as their consciences shall direct them in the matter of religious “ worship.”*

This is all you say of the toleration-act in your Commentaries; and before I make any observations upon it, I beg leave to mention a passage in your answer to Dr. Priestley; who had observed†, that he “ did not know that *MERE nonconformity* was any crime at all in the laws of England—since the act of toleration :”—You say‡, that you “ beg leave to inform Dr. Priestley, “ since it seems he is yet to learn it, that nonconformity is still “ a crime by the laws of England, and hath severe penalties an- “ nexed to it, notwithstanding the act of toleration, (nay ex- “ pressly reserved by that act) in all such as do not comply with “ the conditions thereby enjoined. In case the legislature had “ intended to abolish both the crime and the penalty, it would at “ once have repealed all the penal laws enacted against noncon- “ formists. But it keeps them expressly in force against all “ Papists, oppugners of the Trinity, and persons of no religion “ at all: and only *exempts from their rigour* such serious, sober- “ minded Dissenters, as shall have taken the oaths, and subscribed “ the declaration at the sessions, and shall regularly repair to “ some licensed§” (registered) place “ of religious worship. But, though

* Added, “ And if any person shall wilfully, maliciously, or contemptuously, disturb any congregation, assembled in any church, or permitted meeting-house, or shall misuse any preacher or teacher there, he shall (by virtue of the same statute) be bound over to the sessions of the peace, and forfeit twenty pounds.”

† Remarks, p. 29.

‡ Reply, p. 40, 41.

§ *Registered* is the word in the act. A *licence*, in its common acceptation, implies a power of refusal: but in the present case there is no such power: for the clerk of the peace, or the register of the archdeacon’s and bishop’s court, is by the act required to register such place of meeting, upon its being certified. Accordingly

“ though these statutes oblige me to consider nonconformity as
 “ a breach of the law, yet (notwithstanding Dr. Priestley’s
 “ strictures) I shall still continue to think, that *reviling the ordinances of the church* is a crime of a much grosser nature than
 “ the other of mere *nonconformity*.”

So that, in your opinion, Sir, mere nonconformity is a crime, though not so great as some others; and is so considered in the eye of the law, notwithstanding the toleration-act. The *penalties*, indeed, by that act are **SUSPENDED**, but the **CRIME** subsists still.

In support of this opinion you remark, that “ nonconformity is still a crime, and hath heavy penalties annexed to it, notwithstanding the act of toleration, (nay, expressly reserved by that act) in all such, as do not comply with the *conditions* thereby enjoined.” But these *conditions*, in my opinion improperly so filed, are only a *prescribed method* in which Dissenters are to approve themselves **MERE NONCONFORMISTS**, or in your own words “ no Papists, oppugners of the Trinity, or persons of no religion at all.” Your remark then amounts to this, that popery, heresy and infidelity, or irreligion, are still crimes in the eye of the law, notwithstanding the toleration-act. But can it be inferred from hence, that there is any crime in **MERE nonconformity**? You seem to think it may, and to make it plain, you observe,

cordingly, where this hath been refused by uninformed justices and clerks of the peace, a *mandamus*, upon application, hath been always granted, and it must be, to compel their compliance. Yet in the bishop’s court of the diocese of Winchester (I know not whether in any other) notwithstanding that the toleration-act requires only that the place of worship be *certified*, an *humble petition* is, at least, lately was, insisted upon, to the Right Reverend Father in God, &c. alledging a variety of particulars in support of the petition, and *humbly praying*, that he would be **PLEASED** to licence such a place of worship. To such an unwarrantable extent hath the idea of licensing been carried. But, I hope, this practice is, or will be discontinued. If it is not, and should be legally questioned in the courts at Westminster, as perhaps it may, it will be quickly found, that it cannot be supported.

serve, that "in case the legislature had intended to abolish both the crime and the penalty, it would at once have repealed all the penal laws enacted against nonconformists; but it hath expressly kept them in force," you say, "against all Papists, oppugners of the Trinity, and persons of no religion at all." Your argument I take to be this, that because the legislature hath kept them in force against all Papists, oppugners of the Trinity, and persons of no religion at all; therefore, (a strange non-sequitur surely!) it did not intend to repeal them, and abolish the crime as well as the penalty, as to those who are no Papists, or oppugners of the Trinity, or persons of no religion at all, but mere nonconformists to the established rites and modes of worship. These serious sober-minded Dissenters are *only exempted from the rigour of the penal laws.* They are still *criminals* it seems; only the *penalties* due to their crime are *suspended*; and their nonconformity is still a breach of the law.

UPON this principle, the use of the term, suspension of penalty, both in your Analysis and Commentaries with respect to the effect of the toleration-act, may be easily accounted for, and appears consistent.

It is true, in your Commentaries, after declaring the penalties to be *suspended* by the toleration-act, you immediately add, "which" (toleration-act) "exempts all Dissenters (except papists, and such as deny the Trinity) from all penal laws relating to religion, provided they take the oaths," &c. But this seem to mean nothing more than the suspension which you had just spoken of, and to be only exegetical of that term; to be an "exemption (as you express it in your reply to Dr. Priestley†) from the rigour" or penalties "of those laws," but not from the crime on which the penalties were grounded. This I apprehend, to be your real meaning: I should be glad to find myself mistaken. I think the truth is, that nonconformists (name-

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† Page 40.

ly, to the peculiar rites, discipline and government of the church as this word always signifies) are freed from all the effects of the penal laws, as to crime as well as penalty; but these statutes remain in force, both as to crime and penalty, with respect to those who are *more* than mere nonconformists; who are Arians, or Papists, or persons of no religion at all: and that, not on account of their nonconformity, but of their supposed heresy, or enmity to the government, or infidelity, and irreligion: It is not, I say, their “nonconformity which is still a crime, and hath heavy penalties annexed to it” as you assert; but their supposed heresy, or popery, or irreligion: which is very plain; for, if they purge themselves of these, and shew, in the way described by the toleration-act, that they are no Arians, Popish recusants, or infidels, and persons of no religion, they are immediately, notwithstanding their nonconformity, unaffected by these statutes.

THE question then is, whether Nonconformity be a crime in those, who, complying with the toleration-act, have “approved themselves no Papists, oppugners of the Trinity, or persons of no religion at all?” Or, what is the state of MERE NONCONFORMISTS *under that act*? Are they in the eye of the law criminal, though the penalties are suspended? or are they restored to a legal capacity, and to a freedom from all crime as well as penalty, in virtue of the toleration-act?

IN my opinion, to represent nonconformity as a crime, the penalties of which are merely suspended, is a defective and erroneous account of the state of the Dissenters, under the toleration-act. And to shew this,

THE FIRST observation I would make is: That *suspension* of penalty is not the language of that act. The title of the act indeed uses the phrase, exemption from penalty: it is stiled, An act for exempting their majesties Protestant subjects, dissenting from the church of England, from the penalties of certain laws*.

laws*. But the act itself uses a comprehensible and forcible expression, which excludes the *crime* as well as the *penalty*; it leaves these penal statutes *no operation at all*, with respect to the *Dissenters* who are under the *Toleration-act*; it *repeals* and *annihilates* those statutes with regard to such *Dissenters*. The words of the *toleration-act* are, that those statutes shall not be construed to *extend* to such persons. And if they are not to be construed to *extend* to them, nothing can be plainer, than that they are not to be construed to *affect them at all*, either as to *crime* or *penalty*. Now, if the *statute-law* doth not make this a *crime*, it is certain, it is no *crime* at all by the *common-law*; because the *constitution* of the *church*, and its *peculiar doctrine, worship, discipline, and government*, are founded wholly upon the *statute-law*, and not at all upon the *common law*†.

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INSTEAD,

* It was observed by a learned Judge, who differed in opinion from his brethren in the *sheriff's case*, that the titles of acts of parliament furnish a very good clue for explaining them; and from hence he inferred, that the *act of toleration* is *merely* an exemption from the penalties of certain laws. But I beg leave to observe, that to illustrate or *explain* acts of parliament by their titles is one thing, to *restrain* or *limit* them is another. Whether they amount to *more* than their titles express, must be determined by the words or clauses of the *act* itself. The *test-act* supplies us with a *case* in point, it being entitled, *An act for preventing dangers which may happen from Popish recusants*; and yet every one knows it is so drawn as to comprehend also the *Protestant Dissenters*. Indeed numberless instances might be produced, in which, were we to restrain the intention of acts by their titles, we should fall into most egregious mistakes.

† “ If it is a *crime* not to take the *sacrament* at church,” said a *Noble Lord* in a high department of the law, (and by parity of reason, if it had been to the particular purpose of his argument at that time, he might have said, If it be a *crime* not to go to church, or join in any of its public offices) “ it must be a *crime* by *some law*; which must be either *common* or *statute-law*, the *canon law* inforsing it depending wholly upon the *statute-law*. Now the *statute law* is *repealed*, as to persons capable of pleading, that they are *so* and *so* *qualified*; and, therefore, the *canon law* is *repealed* with regard to those *persons*. If it is a *crime* by *common law*, it must be *so* either by *usage* or *principle*. There is no *usage* or *custom*, independent of *positive law*, which “ makes

INSTEAD, therefore, of saying in the Commentaries, that the *penalties* are all of them *suspended by the toleration-act*, which *exempts*

“ makes nonconformity a crime. The eternal principles of natural religion are
“ part of the common law; the essential principles of revealed religion are part
“ of the common law; so that any person reviling, subverting, or ridiculing
“ them may be prosecuted at common law. But it cannot be shewn from the
“ principles of natural or revealed religion that, independent of positive law,
“ temporal punishments ought to be inflicted for mere opinions with respect to
“ particular modes of worship. Persecution for a sincere, though erroneous
“ conscience, is not to be deduced from reason or the fitness of things: it can
“ only stand upon positive law. See his Lordship’s speech in the Appendix
N°. II.

The act of uniformity 1 Eliz. c. 2, is that positive law upon which rested the obligation to conformity previous to the toleration-act, the acts of uniformity of Edward the Sixth having been repealed by 1 Ma. Sess. 2. c. 2. But it is expressly declared by the toleration-act, that the 14th clause of the act of Elizabeth, which enjoined conformity to the church, shall not be construed to extend to Protestant Dissenters, that is, it is repealed with regard to such persons; and the acts of the 2d of Edward the Sixth, c. 1. and of the 5th and 6th of Edward the Sixth, c. 1. which were revived by the second clause of the act of uniformity of Elizabeth, are, as far as they require conformity to the church, repealed by section the third of the toleration-act, which frees *members* from all ecclesiastical censures, and consequently from those to which they were exposed by the revived acts of Edward the Sixth. When, therefore, the learned Commentator mentions 23 Eliz. c. 1. 35 Eliz. c. 1. 17 Car. II. c. 2. 22 Car. II. c. 1. as acts from which the Dissenters are exempted by the toleration-act, he ought above all to have mentioned the 14th clause of the act of uniformity, and those ecclesiastical censures to which the Dissenters were liable by the revived acts of Edward the Sixth. His not having done this may possibly lead some of his readers to conclude, that notwithstanding the subsequent penal laws against Dissenters, are repealed, yet those acts of uniformity on which the original obligation to conformity was founded are still in force with regard to them; and that accordingly they are obliged to conformity *de jure*, though excused from the penalties of certain laws by which it is enforced; whereas an attention to the repeal of the acts which I have mentioned, in respect to Dissenters, would, I think, clearly shew that they are under no such obligation, and consequently are not criminal in their Nonconformity; and, I hope, therefore, that these plain matters of fact, which are so material to the right decision of the question between us, will not be omitted in any future edition of the Commentaries.

exempts all Dissenters, except Papists, and such as deny the Trinity, from all penal laws, &c. should it not have been said, that all penal laws for nonconformity are *repealed*, with regard to those Dissenters, who are qualified as the act directs? And would it not have been proper to mention, that the Dissenters are freed from prosecution in the ecclesiastical courts? And that there is nothing, therefore, in the law of England, which can make mere nonconformity a crime, any more than liable to penalty?

THE SECOND observation I would make is this: That both the crime and penalty of mere Protestant nonconformity are abolished by the act of toleration, is evident from the protecting clauses of that act: which, in the words of a great lawyer, "have not only exempted the Dissenters way of worship from punishment, but rendered it innocent and lawful; have put it, not merely under the connivance, but under the protection of the law, have *established* it. For nothing can be plainer, than that the law protects nothing in that very respect, in which it is, at the same time, in the eye of the law a crime. Dissenters by the act of toleration, therefore, are restored to a legal consideration and capacity." And this is a view of their condition under the toleration-act, of great importance. For many consequences will from hence follow, which are not mentioned in the act; and which would not follow, if the act amounted to nothing more than a suspension of penalty. For instance, previous to this act, a legacy, left to dissenting ministers and dissenting congregations, was not esteemed a valid one; because the law knew no such persons, and no such assemblies; and it was left to what the law called superstitious purposes. But will it be said in any court in England, that such a legacy is not a valid one now? and yet there being nothing said of this in the toleration-act, it can only follow, consequentially, from the Dissenters being restored by that act to a legal consideration and capacity, and being no longer criminal in the eye of the law, as they were before that act was enacted.

THE THIRD observation which I would make is: That the unanimous judgment of the commissioners delegates*, and of the House of Lords† affirming that judgment, in the great cause between the city of London and the Dissenters, concerning the fine inflicted by a by-law of the city on those who refused the office of sheriff, was grounded entirely on this opinion, “ That the toleration-act removed the crime as well as the penalty of mere nonconformity.”

THE case, you know, was this: By the corporation-act no person can be placed, chosen, or elected into any office of or belonging to the government of any corporation, who hath not taken the sacrament in the church of England within a year preceding the time of such election. The defendant ‡ pleaded, That not having received the sacrament at church within a year preceding, he was both uneligible and disabled from serving; and that, being a Dissenter within the description of the toleration-act, and thereby freed from all obligation to take the sacrament at church, his omitting it was no way criminal; and that, therefore, the disability he had incurred was a lawful plea in bar of this action, to excuse him from the fine imposed upon those who refused the office of sheriff. The city having brought the cause before the House of Lords by appeal from the commissioners delegates, who had given judgment for the defendant: the House ordered this question to be proposed for the opinion of the judges. How far the defendant might, in the present case, be allowed to plead his disability in bar of the action brought against him?

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* Lord Chief Baron Parker, Mr. Justice Foster, Mr. Justice Bathurst, and Mr. Justice Wilmot, now Lord Chief Justice of the Common-pleas. They delivered their opinions *seriatim*, on the 5th of July 1762, after hearing counsel several days. Lord Chief Justice Willes, who was first in the commission, died before judgment given.

† On the 4th February 1767.

‡ Allen Evans, Esq;

IT was allowed on all hands, that if his nonconformity, and his consequent disability, was criminal, he could not plead it.

AND for this reason one of the Judges* was of opinion, (contrary to the rest of his brethren), that the defendant's disability, in the present case, could not be pleaded; because, as he said, the toleration-act amounted to *nothing more than an exemption of Protestant Dissenters from the penalties of certain laws therein particularly mentioned*; and the corporation-act not being mentioned therein, the toleration-act could have no influence upon it; and therefore his disability, incurred by his nonconformity in consequence of the corporation-act, was, in his opinion, a culpable one, and rendered him liable to any penalties, to which any others are liable for refusing to ~~serve~~ the office of sheriff; inasmuch as no man can disable himself; but if he refused to take the sacrament according to the rites of the church of England, he disabled himself; and the fine imposed was a punishment upon him for the crime of his nonconformity, from which he could plead no legal exemption.

BUT all the other Judges† were of a contrary opinion, That the corporation-act expressly rendered the Dissenters ineligible, and incapable of serving; its design being to keep them out, as persons at that time supposed to be disaffected to the government: and though the disability arising from hence could not then have been pleaded against such an action as is now brought against the defendant, nonconformity being then in the eye of the law a crime, and no man being allowed to excuse one crime by another; yet the case is different since the toleration-act was enacted, *that act* amounting to *much more than a mere exemption*

on

* Mr. Baron Perrott.

† Mr. Justice Hewitt, now Lord Lifford, and Chancellor of Ireland; Mr. Justice Aston, Mr. Justice Gould, Mr. Baron Adams, Mr. Baron Smythe, Mr. Justice Clive. Mr. Justice Yates was at that time ill, and incapable of being present.

on from the penalties of certain laws, and having an influence upon the corporation-act consequentially, though the corporation-act is not mentioned therein ; by freeing the Dissenters from all obligation to take **the** sacrament at church, abolishing the crime as well as penalties of nonconformity, and allowing and protecting the dissenting worship. The defendant's disability, therefore, they said, was a lawful one, a legal and reasonable, not a criminal excuse ; it was not in the sense of the law disabling himself ; the meaning of that maxim, “ That a man shall ‘‘ not disable himself,” being only this, that no man shall disable himself by his own wilful fault or crime ; and nonconformity being no longer a crime since the toleration-act was enacted, he is disabled by judgment of parliament, namely, by the corporation-act, without the concurrence or intervention of any crime of his own ; and therefore he may plead this disability in bar of the present action.

So that the arguments of the Judges turned upon this single point, That the toleration-act removed the *crime* as well as the *penalties* of nonconformity ; and in this they all, except one, agreed. The whole was summed up, and the reasoning on the opposite side examined and confuted, with his usual perspicuity and force of argument, by Lord Mansfield* ; and upon this ground the House of Lords affirmed, *nemine contradicente*, the judgment of the commissioners delegates.

IN stating, therefore, the case of the Dissenters under the toleration-act, should not some notice have been taken of the protecting clauses of that act †, and of their influence and operation upon

* See his Lordship's speech in the appendix **No. II.**

† In the last edition of the Commentaries the protecting clauses are mentioned, but no conclusion is drawn from them ; nor is it mentioned, as I before observed it should have been, that Dissenters under this act are expressly freed from all ecclesiastical censures ; much less is it said, as the result of the whole, that they are restored to a legal capacity, and neither punishable nor criminal on account of their nonconformity.

upon the legal condition and capacity of the Dissenters? Surely the suspension of penalties is not all that this act amounts to.

WHETHER the toleration-act is extensive enough as to those who *should be* its objects, is one question; what is its meaning and intent, with respect to those who *are* its objects, is another. Mere nonconformists with respect to the worship, discipline, and government of the church, are certainly its objects: and I think it ought not to have been limited, as it is, in regard to the doctrinal articles of religion. But still, with respect to those persons whom it does comprehend, that is, the mere nonconformists to the constitution and rites of the church, it puts them on a very liberal footing, not on that of *connivance* only but of *protection* also. And the more the idea of *legal protection* is examined, the more will it appear to justify the strong expression, which the Noble Lord before mentioned used concerning the dissenting worship, that it is ESTABLISHED. If the justices of the peace at the quarter-sessions, or the register of the bishop's court should refuse to register a dissenting place of worship, a *mandamus* always is and must be granted, upon application, in Westminster-hall, to compel them to the discharge of their duty. And is it not absurd to suppose, that a *mandamus* must issue in a case, which the law regards as criminal? Is not the law to be considered as giving its *whole sanction*, and exerting its *whole energy*, in respect to whatever justifies and requires a *mandamus*? and does not this amount, strictly speaking, to the idea of the word *established*?

WHEN the late incomparable Speaker of the House of Commons, Mr. Onslow, was informed of the expression, which the learned and Noble Lord used on this occasion, he observed, in a conversation with which he honoured me, that this was the language he himself had always held; that, as far as the authority of the law could go in point of *protection*, the Dissenters were as

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truly established as the church of England*; and that an established church, as distinguished from their places of worship, was properly speaking, only an *endowed church*; a church, which the law not only protected, but endowed with temporalities for its peculiar support and encouragement†.

IF it should so happen, after all, that I should have mistaken your meaning, and that your idea of the condition of the Dissenters under the toleration-act is the same with mine, that they are freed from the *crime* as well as penalties of their nonconformity; I apprehend, some alteration will still be necessary in your representation of the purport of the toleration-act: which representation, as it now stands, leads your reader naturally, and almost necessarily to conclude, that your apprehension of the design of that act is not so enlarged as, in my humble opinion, it ought

* The penalties inflicted by the act of toleration on those who disturb any dissenting congregation for divine worship, or misuse the preacher, are precisely the same as on those who disturb the congregation, or misuse the preacher, in any cathedral, parish church, or chapel; and dissenting ministers, as well as the clergy of the church of England, are excused from all burdensome offices.

†. I suppose it is upon this idea, that, since the toleration, it hath been the invariable practice of our Sovereigns, in their speeches to their parliaments upon their accession, after declaring their affection to the church of England, and resolution to support it, to add, That they will maintain the toleration inviolable. When this was done at the commencement of the present reign, the Lords in their address of thanks, paid a just and expressive compliment to the toleration, by stiling it, THAT SUREST CEMENT OF THE PROTESTANT INTEREST IN THESE KINGDOMS. And this expression, in answer to that part of the royal speech, which contained a promise of preserving and *strengthening* the constitution in *church* and state, was the more apposite, as it conveyed this certain truth, That the union of Protestants among themselves in mutual affection and esteem, however they may differ in *formularies* of doctrine or *rites* of worship, is the best support of their common interest; and that the church of England, in particular, can never be more *strengthened*, or placed on a firmer foundation, than by encouraging the generous principles of *toleration*, and an impartial regard to the right of *private judgment*.

ought to be. And if, upon further reflection, you are convinced of this, I am very sure, from the specimens you have already given of your candor in similar cases, you will take care to guard against any misapprehension of your judgment in future editions of your incomparable book. That openness to conviction, and that consequent disposition to correct mistakes, which you have discovered, does you more honour, in a moral view, than all your intellectual abilities, great as they are; inasmuch as integrity and ingenuity of heart deserve, and will receive from those whose good opinion is worth regarding, much more applause than the acuteſt discernment, or the profoundeſt and moſt accurate judgment. I am,

S I R,

with great esteem,

your obedient humble servant,

P. F.

L E T T E R II.

SIR,

YOU have a disposition, I am persuaded, too ingenuous and liberal, to be offended at a candid, though free discussion of your sentiments: I shall make no apology, therefore, for laying before you my remarks on some other passages, as I have already done on one particular point, in your justly-admired Commentaries on the laws of England.

WHEN Dr. Priestley observed in his Remarks, p. 28. that you quoted with approbation *the statute of William the Third, against “ persons educated in the Christian religion, or professing the same, who shall by writing, printing, teaching, or advised speaking, deny any one of the persons in the Holy Trinity to be God, or maintain that there are more gods than one :” by which statute they are made liable to the pains and penalties inflicted by the same statute on apostacy; that is, “ for the first offence, they are rendered incapable of holding any office or place of trust; and for the second, are rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands; and are to suffer three years imprisonment without bail :” I say, when Dr. Priestley remarked, that you cited this severe statute with approbation, you disclaimed the imputation in your Reply†; and alledged, that you “ barely recited the statute, without either approving or disapproving it.” It will surely then, be proper to omit these

* Comment. vol. iv. p. 50.

† The Emperor Marcian, in an edict against the Eutychians and Appollinarians, rendered them incapable of disposing of their estates, of making a will, or of inheriting any thing by the will of others, or by deed of gift. *Concil. tom. 2. p. 678. edit. Hard.* Some of the clauses in the act of parliament seem to have been copied from this worthy original.

‡ Reply, p. 39.

these words in your Commentaries*, which you will find a little before your citation of this statute. “ Every thing is now as it

* Comment. p. 49. This passage is altered in the new edition in the following manner: “ Every thing is now as it should be *with respect to the spiritual cognizance, and spiritual punishment of heresy*; unless perhaps that the crime ought to be more strictly defined, and no prosecution permitted, even in the ecclesiastical courts, till the tenets in question are by proper authority previously declared to be heretical. Under these restrictions, it seems necessary for the support of the national religion, that the officers of the church should have power to censure heretics; yet *not to harass them with temporal penalties, much less to exterminate or destroy them*.” If the worthy author means, that the censures of the church are not to extend to the infliction of any temporal penalties on heretics, as I must suppose he does, this is an amendment of very great importance; tacitly condemning a power of excommunication accompanied with any such penalties, especially when, as in the church of England, that censure deprives men of all the privileges of society; of suing an action, being witnesses, making a will, receiving a legacy, and, after a certain time, renders them liable to imprisonment; and confining it, as it ought to be confined, to a mere exclusion from christian communion, which affects the person so censured in none of his civil rights.

But if the author intends, which I can hardly allow myself to surmize, that the censures of the church may include temporal penalties, though not in such a degree as to *harrass* the heretic: then all the arguments which I have urged against the infliction of any kind or degree of temporal penalties in such cases, will be still applicable to the passage as it is now amended.

“ The spiritual cognizance and spiritual punishment of heresy;” *should* ex vi termini, exclude all temporal penalty; but whether in our ecclesiastical constitution “ all things are as they should be” in this respect, I think, with submission to the learned gentleman, deserves to be reconsidered. The act for the repeal of the writ de hæretico comburendo, 29 C. II. c. 9. sect. 2. expressly provides, that the judges of the ecclesiastical courts shall have a power to punish heresy by excommunication, (which, as we have seen, includes very *harrassing* temporal penalties) by deprivation, degradation, and other ecclesiastical censures, only not extending to death: which is the sole exception. When the learned Commentator therefore grants that heretics “ are not to be harrassed with temporal penalties, much less to be exterminated or destroyed,” he seems virtually to deny, what he had just before too incautiously affirmed, that “ all things are now as they should be,” “ with respect to the spiritual cognizance and spiritual punishment of heresy.”

However, on the whole, I am inclined to think, by the concession, that *heretics*

“ it should be, unless perhaps that heresy ought to be more strictly defined,” &c. This, your readers will be apt to think amounts to an approbation of all that follows; and particularly of the act here referred to, which is presently after quoted as now in force; and therefore, as one of the things which, you say, “ are as they should be.”

TRULY, Sir, it is much to be desired, that you would review this whole paragraph with attention. The only objection which you make to the intolerant and persecuting laws now in force against heresy is, that “ heresy is not defined in them with sufficient precision;” and, you think, “ no prosecution should be permitted, even in the ecclesiastical courts, till the tenets in question are, by proper authority, previously declared to be heretical.” And provided this be done, “ every thing is then,” you say, “ as it should be.”

So that, in your opinion, it is fit, that heresy should be punished with temporal penalties; only care should be taken, that what is heresy, be first settled by proper authority*. But here

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heretics are not to be harrassed with temporal penalties, he intended to declare against the use of any temporal penalties in cases of heresy. And I only wish that he had expressed his meaning so precisely, as to exclude all possibility of the severest critic’s putting a less favourable construction upon his words; and that before he had declared his approbation of the present state of our ecclesiastical constitution, in regard to what he calls the spiritual cognizance and spiritual punishment of heresy, he had well considered to what that approbation amounts: whether it does not imply more than any one, who is an enemy to harrassing heretics with temporal penalties, will undertake to defend. I submit it therefore to the consideration of the learned gentleman himself, whether it is not necessary to make some further alteration in this paragraph, in justice to the liberality of his own sentiments, and to prevent his authority being produced in support of a power vested in ecclesiastical governors, of censuring and punishing heretics in a manner which he seems to disapprove.

* The nature of heresy, in the scripture sense of the word I think, hath been very much mistaken. The heretics, whom, in the New Testament, we are directed to avoid, were not the humble, modest, and peaceable, though erroneous

the question occurs, What is proper authority? and where is it lodged? I suppose, Sir, you will place it either with the ecclesiastical governors, or with the legislature. But in the hands of either, it will certainly amount to nothing more than human authority, the authority of fallible men; which, I apprehend, upon examination, will be found to be no authority at all in the present case, that is, in defining what is true faith, and what is heresy, and marking out their respective boundaries.

IF the scripture is to determine for us, the point, I think, is clearly decided. For our blessed Saviour hath commanded his disciples not to be “ called masters; for,” faith he, “ one is your Master, even Christ, and all ye are brethren†;” and this he said in opposition to the authority which the Jewish rabbies assumed, in deciding questions of their law. And the apostles, who certainly, if any persons, might have pretended to authority in matters of faith, declared, “ that they had no dominion over “ the faith” of Christians; but were “ only helpers of their “ joy*.” They appealed to reason and conscience, and referred the final decision to every man’s own private judgment: “ We “ speak as unto wise men; judge ye what we say†.” The Bereans are commended for “ searching the scriptures” of the Old Testament daily, to see, “ whether the things” which the apostles declared to them “ were so” as they reported§. And it is

ous Christians, who adhered to the authority of Christ, and desired to know and do his will; but the proud, pragmatical, turbulent party-men, who disturbed and divided the church by their impositions, and innovations in the terms of brotherly affection and Christian communion, and by assuming an authority over their fellow Christians. Heresy, in the sense of scripture, doth not consist in simple error; nor were those hereticks, who were anathematized and persecuted; but only those who anathematized and persecuted others, refusing to acknowledge them for true Christians, on account of their supposed or real mistakes. Whosoever carefully and conscientiously consults the sacred oracles, with a desire of knowing and doing the will of Christ, cannot be an heretick in the scripture-meaning of the expression. See Hallet’s Notes and Discourses, vol. 3. disc. ix. throughout, especially p. 390.

† Matth. xxiii. 8, 10.

* 2 Cor. i. 24.

† 1 Cor. x. 15.

§ Acts xvii. 11.

is the duty of every Christian to endeavour, for himself, to understand the sacred oracles, as well as he is able, in the use of all the means and helps which divine providence puts in his power†.

INDEED, every man's private persuasion or belief, must be founded upon evidence propos'd to his own mind; and he cannot but believe, according as things appear to HIMSELF, not to others; to his own understanding, not to that of any other man. Conviction is always produced by the light which is struck into the mind; and never by compulsion, or the force of human authority‡.

B U T

† Human helps and assistances, while they are only employed to open and inform the understanding, are very desirable and useful. But human authority, sitting in judgment on points of faith, and deciding cases of heresy, and controulring, without enlightening, our understandings, is a very different thing. There is, surely, sufficient room for our receiving instruction and assistance in matters of religion, without being deprived of our right of judging, in the last resort, for ourselves. And that we must do in opposition to all human authority, in whatsoever hands it be lodged, and with whatsoever venerable titles it comes recommended; or else we violate our allegiance to Christ, the only lawgiver and king in his church.

‡ If it be urged, that we believe many things upon *human authority*: I admit it, in case by authority we mean *testimony*. But there is a manifest difference between human testimony, as to matters of fact: and human authority, as to matters of opinion, and principles of truth. The former may be, and often is, a rational ground of belief; the latter is believing upon no evidence, and is a renunciation of reason. The authority or testimony of the apostles, and first teachers of Christianity, was accompanied with divine credentials; and this rendered it a sufficient foundation for the belief, both of the facts and doctrines they revealed. And, indeed, human testimony, under the influence of inspiration, and supported by miraculous interposition, is *always* a just ground of our belief of religious truth, as well as facts; but the authoritative decrees and injunctions of fallible, uninspired men, *never*. The former claim an absolute regard, as being a proof and evidence of a divine mission; the latter are no evidences of religious truth, or ground of belief of it all, and therefore deserve no regard. And it seems very strange, that men should presume to exact of us, what God himself does not; the belief and profession of opinions for which we can perceive no fort of evidence.

BUT it may be alledged, perhaps, that other men's understandings are better, and more penetrating and judicious than ours; or, that great numbers, especially of persons venerable for their age, as well as for their piety and learning, are more likely to be in the right, than a few individuals; and that, consequently, it will be *safer* to be guided by their judgments than by our own. To this I reply: That a man's own understanding, be it more or less judicious, is the only faculty which God hath given him to distinguish truth from error: and as every man is accountable only for the use of his own understanding, not for that of other men's; consequently, his safety consists, not in giving up his own to the direction and controul of others, but in using it himself to the best advantage. And should he, in the careful and conscientious use of it, err; that error will never be imputed to him as a crime: Whereas, if he follows the judgment of other men, though ever so wise and learned, contrary to his own sense of things; he may perchance *profess* what is *right*, but he *does* what is *wrong*, and is highly criminal in the sight of God. For, the professing of any doctrine should always follow conviction of the truth of it; at least, a man must never profess what is contrary to his conviction. To embrace, or profess, any point which he does not believe to be true, in compliment to human authority, is exalting *human* into the place of *divine* authority; and saying in one word, That it is better to obey man than God.

So that for any man, or body of men, whether clergy or laity, to assume an authority, first, to define what is heresy, and then to condemn and punish it by temporal penalties, is the ready way to make men hypocrites; while it can, in no case, render them true believers or good men.* But not to insist upon

U this:

* Submitting to the decisions of human authority in matters of faith, is *sometimes* prejudicial to, and even subversive of, true religion, where it does not issue in downright hypocrisy. For, as, on the one hand, by the exercise of our rational

this: what I would principally observe to you, Sir, who are by profession a lawyer, is :

THAT heresy not being sufficiently defined by our laws, seems to be no small security, in connection with the lenity of the times, that those laws will not be executed; on account of the difficulty of defining what is heresy; and, perhaps, of finding a jury, or even any ecclesiastical judges, that will be forward in defining it, where the law hath left it doubtful and undefined. What, therefore, you, Sir, imagine a defect in the law, which ought to be supplied, appears to me to be a circumstance very favourable to the secure enjoyment of the rights of conscience; and, I hope, criminal prosecutions for opinion, either in civil or ecclesiastical courts, will never be rendered more easy and feasible, than they are at present.

THE next enquiry, on supposition heresy is cognizable and punishable by human authority (as you seem to think) naturally is : What that punishment shall be?

You tell us, that "under these restrictions" (namely, that heresy should be more strictly defined; and no prosecution permitted, till the heresy is by proper authority ascertained) "it seems necessary, for the support of the national religion, that the officers of the church should have power to censure heretics, but not to exterminate or destroy them." In this assertion is it not plainly supposed, that the censures of the church are

rational faculties in searching after truth, we are not only likely to arrive at it, but to improve in the love of it, in candor, docility, and openness to conviction; and are disposed to submit to its influence: so, on the contrary, in proportion as we resign ourselves to the conduct of human authority, truth loses its charms and its influence over us; and we become blind to its clearest evidences, and brightest characters, and are thus prepared to be led into the most absurd superstitions, and vilest corruptions of religion. And this is the case among all parties, in the degree in which they give up the free exercise of their understandings, and take human authority for their guide.

† Comment, vol. iv. p. 49.

are to be attended with temporal penalties? only not so as to exterminate or destroy the heretick. In the name of humanity, Sir, is this the only exception to the extent and effect of the church's censures, that they shall not reach to utter extermination? Are all other pains and penalties proper, in whatsoever degree they are inflicted, which affect only a man's liberty or property, provided he is not destroyed thereby? If this be your meaning, (and, I think, you should have left no ground for suspicion that it is your meaning, if it is not) what more ample scope could any persecutor desire for his wanton cruelty, than you allow; unless, like another Bonner, he thirsted for human blood? —Excuse me, Sir, the warmth of my expression. This sentence of yours must, surely, have dropped from you inadvertently; and can never seriously be intended to mean, what it seems to imply.

To examine the point more thoroughly: Is the infliction of temporal penalties upon heretics, really necessary to the support of a national establishment? If so, how comes it to pass, that a national establishment is in its nature so opposite to the genius of Christianity, of that kingdom which is not of this world, and which consists not in any thing this world can bestow or secure; but only in righteousness, truth, and peace? Religion is seated in the heart of man, and conversant with the inward principles and temper of the mind; and it cannot therefore, properly speaking, be established by human laws, or enforced by temporal punishments. There is nothing in a fine, or a dungeon, or in any other penalty which the magistrate can inflict, that is calculated to produce conviction. Truth can only be supported and propagated by reason and argument; in conjunction with that mild and persuasive insinuation, and that openness and candor, and apparent benevolence in its advocates, which are suited to invite men's attention, and dispose them to examination. No civil punishments are adapted to enlighten the understanding, or to conciliate the affections. And therefore the "weapons" which

the ministers of religion (or, in your style, “ the officers of the “ church”) are directed to use “ are not carnal,” but spiritual.

FOR my own part, I believe, it would have fared much better with the interest of true religion, if it had been left to make its way by the force of its own native excellence, and evidence only ; than it hath done since it hath been incorporated with civil constitutions, and established by human laws. For, even temporal emoluments, (leaving penalties out of the question) annexed to the profession of any form of religion, in such degree as to excite men’s avarice and ambition, and dispose them to mean an unworthy, not to say wicked compliances to obtain or secure them ; have done, I apprehend, infinite mischief to the religious and moral characters of multitudes in all ages and countries[†].

BUT

† 2 Cor. x 4:

‡ The ingenious author of the Free Enquiry into the nature and origin of evil, gives us a very strong picture in a different point of view, of the bad effects of religious establishments ; namely, of the ill influence which they have, both on the purity of religion and the liberties of mankind. “ The moment,” saith he, “ any religion becomes national, or established, its purity must certainly be lost, because it is then impossible to keep it unconnected with men’s interests ; and if connected, it must inevitably be perverted by them,” p. 225. edit. 4. Again, “ that very order of men, who are maintained to support its interests, will sacrifice them to their own,” p. 225, 226. “ By degrees knaves will join them, fools believe them, and cowards be afraid of them ; and having gained so considerable a part of the world to their interests, they will erect an independent dominion among themselves dangerous to the liberties of mankind ; and representing all those who oppose their tyranny, as God’s enemies, teach it to be meritorious in his sight to persecute them in this world, and damn them in another. Hence must arise Hierarchies, Inquisitions, and Popery ; for Popery is but the consummation of that tyranny which every religious system in the hands of men is in perpetual pursuit of, and whose principles they are all ready to adopt, whenever they are fortunate enough to meet with its success.” See p. 223—230. The freedom of these sentiments having “ given some offence”, as being supposed to contain “ a reflection upon all national churches, and a persuasion to schism, and “ dissention ;”

BUT when such national establishments, besides the rewards which they bestow upon their church-officers are guarded by temporal

“ dissention ;” the author makes this apology in the preface to his fourth edition, p. 25. “ Those,” faith he, “ who think thus, totally misapprehend the “ tenor of this whole work, which endeavours to prove, that every thing human must be attended with evils, which therefore ought to be submitted to with patience and resignation ; that many imperfections will adhere to all governments and religions in the hands of men ; but that these, unless they rise to an intolerable degree, will not justify our resistance to the one, or our dissention from the other.” And to make it the more apparent that he is no enemy to establishments, he adds, that were no religion to be established at all, “ it would let in such an inundation of Enthusiasm and contradictory absurdities, as must in a short time *destroy not only all religion, but all peace and morality whatsoever* : of which no one can entertain the least doubt, who is not totally unacquainted both with the nature and history of mankind.” Though the author had before painted, in very lively colours, the ill effects of that connection between religion and men’s secular interests, which subsists in national establishments ; he here represents those effects to be of little consequence, in comparison of that “ inundation of enthusiasm and contradictory absurdities, which,” in his opinion, were there no establishment, would, in a short time, “ destroy not only all religion, but all peace and morality”. On the contrary, I think it would be easy to shew from the history of mankind, that greater evils have been produced by religious establishments, than either have been, or are likely, or I think possible to be, by the want of them. The grossest enthusiasm and absurdity have often made a part of them, and have been patronized and upheld by those who have been most zealous for them, sometimes by persecution and violence, at the expence of every principle of humanity and justice. But supposing there were no establishments, why must “ all religion be destroyed ?” I rather think the free exercise of the human understanding, without any byas from interest, would tend very much to promote both the purity and progress of religion. And I have too high an idea of the strength of its evidence, and the charms of its excellence, and of its interest in the protection of the great Sovereign of the Universe, to imagine its existence depends upon human establishments. It is certain, fools will be fools and enthusiasts will be enthusiasts ; nor will establishments prevent their acting agreeably to their real character. If recourse be had to penal laws and to intolerant measures, it will augment and inflame the disease ; and if the caustic is continued till the patient is destroyed, still enthusiasm and absurdity will spread like an infection ; and not being tolerated, will perhaps, in some shape or other, take possession of the establishment ;

temporal penalties, inflicted on all who cannot follow the lead of the public wisdom and public conscience; they are then neither better

blishment itself; either under false colours and by the artifice of their votaries, or through the folly of those, who in the wantonness of power and weakness of intellect, frequently bring in, and impose, more extravagant absurdities, and things more destructive of true religion, themselves; than they refuse to tolerate in others. It had been well, if this conduct had been wholly confined to the church of Rome.

Again, why must "all peace and morality be destroyed," if there be no religious establishments? Does the existence of common sense, and a regard to the essential interests of society, wholly depend upon such establishments? Can magistrates do nothing by enacting and executing wholesome laws, to preserve the public peace and order? Will no wise, no good, no public-spirited men, (not to say ministers of religion) promote the same salutary end? or will there be no such persons existing?

But though the evils of establishments are very great and numerous, as the author had represented them, yet he saith, "the imperfections which adhere to all governments and religions, unless they arise to an intolerable degree, will not justify our resistance to the one, or *our dissent from the other.*" Resistance or force, I own, should not be employed against civil government, except in cases of extreme necessity, and when what is styled government is no longer government, but tyranny: nor indeed should any attempt be made to overturn a religious government by force, unless its existence is incompatible with the safety or essential rights of others; as indeed it always is, when it will not allow a toleration; and in that case its destruction, in any method suited to accomplish it, is mere self-defence. The Author therefore should have compared with resistance to civil government, not a dissent from an establishment, but an attempt to overthrow an establishment by force; because, though civil government cannot allow or suppose resistance or force to be used against itself (for that as I have said, becomes warrantable only when it ceases to be government); yet that establishment which does not always allow a dissent from itself, is a mere ecclesiastical tyranny: for liberty of religious dissent is a right incident to human nature; and a right, which the legislature of this country hath accordingly recognized by the Toleration; which, nevertheless, this Author strangely compares to an illegal resistance of the civil power.

He further observes, that "from a dissent can accrue no remedy to the evils of an establishment," p. 26. It must however be admitted, that it serves at least to correct the virulence of the disease, and to retard its progress towards an entire state of corruption, or tyranny; to which, according to his own account,

better nor worse than notorious violations of the laws of Christ, and of his royal prerogative? they are destructive of the very design of his religion, which is of no value if the profession and practice of it be not a free and reasonable service: and are an open invasion of the common rights of humanity.

But perhaps you will say, I am leading you into “ a theological controversy*.” I shall only refer it, therefore, to your further

it naturally tends. From a slight attention to the history of the church of England from the time of the reformation, we may easily collect, that the Puritans and Dissenters have had no inconsiderable share, especially at certain periods, in stopping the progress of ecclesiastical corruption, and keeping down that exorbitant power, which the Hierarchy otherwise might, and certainly would, if the author’s account of its tendency be just, have long since attained. And this, I hope he will admit to be no contemptible service.

In consequence of some things I have advanced, it will perhaps be asked, whether I aim at subverting all ecclesiastical establishments? The reader may be assured, I am not so visionary as to aim at an object, which is wholly out of sight, and not at all to be expected. But I am persuaded, that such establishments are not vindicable *de jure*, or perfectly compatible with the right every man hath of judging and acting for himself in matters of religion; whatever specious arguments may be adduced to prove their expedience, or at least that they are, as this Author supposes, necessary evils. And if this be our opinion concerning establishments, that they are not strictly vindicable on principles of liberty, we shall easily perceive, that an establishment without a toleration is detestable; and that in an establishment with a toleration, it is the toleration which is the most sacred part of the constitution; that being the assertion of religious liberty which is a natural right, whereas an establishment is always, more or less an invasion or infringement of it. And should any of those who acquiesce in religious establishments, happen to embrace such sentiments concerning them, I can see no worse consequence likely to arise, than that they would be made more zealous for reducing them to as near a conformity as possible, with christian liberty and christian simplicity: whereas high notions of the authority of ecclesiastical governors, or of the civil magistrate, in matters of religion, are apt to teach that “ patient resignation” of private conduct to public judgment, which, though this ingenious author seems to think it very commendable, I am glad it is not my task to defend.

* See Reply to Dr. Priestley, p. 38.

ther consideration, whether the *law* cannot support the church in all her *rights* and *immunities*, unless she is invested likewise with the unwarrantable and dangerous power of *punishing* those who call in question, or dissent from her established formularies of doctrine or worship.

IF you only mean, indeed, by the censures of the church, her refusing communion to those who differ from her in articles of faith which she thinks important, without allowing her to enforce those censures by any temporal penalties; I acknowledge, I have then misunderstood you. But I appeal to yourself, Sir, upon further reflection, whether that mistake, if it be one, is not owing to your assigning no other limitation to the effects of those censures, than that they should not extend to “utter extirmination and destruction.”

I FREELY confess, I am so far from thinking, that any church hath a right to use temporal penalties to bring persons to her own terms of communion, that, I apprehend, she is invested with no authority to make any terms of communion at all, which Christ hath not made; and those which he hath made, are only to be enforced by spiritual sanctions; by his own authority as head of the church, by the dread of his displeasure, and by the hope of his favour. And a national church I apprehend, will stand much firmer upon this noble and extensive foundation of reason and scripture, than on the narrow and feeble one of human authority, fenced as much as you please, with all the terrors of pains and penalties.

PERHAPS it will be asked, Are we to leave every man at liberty to propagate what sentiments he pleases? It is my opinion, I profess, that truth is so far from suffering by free examination, that this is the only method in which she can be effectually supported and propagated. But, with this idea I am not so happy as to be able to reconcile the following sentiment: “I would ‘not,’ you say, ‘be understood to derogate from the just rights

“ rights of the national church, or to encourage a loose latitude
 “ of propagating any crude undigested sentiments in religious
 “ matters: of propagating, I say; for the bare entertaining
 “ them, without an endeavour to diffuse them, seems hardly
 “ cognizable by any human authority*.”

THAT indeed is very true, if by bare entertaining you mean merely believing; and a good reason there is for it, because the heart of man is inferutable; because there it *a natural impossibility* for any human authority to interfere with the inward sentiments of the mind, while they are concealed from outward observation. But if by entertaining you intend (contrary to the usual sense of the word, and not very consistently with your approving of our present laws against heresy) to allow the profession of such sentiments, provided men do not aim at diffusing them; yet the moment reasons are offered to support or recommend that profession, human authority may interpose, it seems; because it is, “ one of the just rights of the national church, from which,” you say, “ you will by no means derogate,” to prevent “ the propagation of any crude undigested sentiments in religious matters:” that is in reality, (for to this it amounts) any sentiments different from those by law established; every establishment supposing those sentiments to be crude and undigested, which are contrary to its own principles and practices. A maxim, which will vindicate the exercise of human authority in support of every establishment that ever was, or will be: Mohammedism at Constantinople, Popery at Rome, Episcopacy in England, Presbyterianism at Geneva, or in Scotland! For all the adherents to these several persuasions think, those who differ from them entertain, at least, *crude and undigested sentiments in religious matters*. Indeed, this principle, pursued into its genuine consequences, would have precluded the reformation from Popery, and would even have stifled in its birth our holy religion itself. If the propagation of truth, or of supposed truth, in matters purely religious, is to be restrained by human authority, (whether you call it civil or ecclesiastical,

W

is

* Comment, vol. iv. p. 49.

is the same at last; for they are both alike exercised by fallible men): in that case, the success of true religion in the world, depends wholly on the power of the magistrate, or on the majority; either of which may be as likely, at least to be on the side of error as of truth.

FROM this idea, that the suppression of heresy, or the preventing the propagation of it, by temporal penalties, is necessary to the establishment of truth, or of a church, have been derived all those execrable and outrageous persecutions, which have disgraced not only our religion, but human nature itself. For there is a gradation, in this case, as natural as it is common; the same principle which induces men, at first, to employ what are called moderate penalties, in order to compass so good an end as the suppression of error, leading them (in case that end cannot *otherwise* be accomplished, that end which they think *must* be accomplished: the very same principle, I say, leading them) to the measures still more and more severe and intolerant, till by degrees they are reconciled to the most inhuman persecutions, and bloody massacres. And in case they do not proceed to such lengths, to what shall we ascribe it? to their principle? or to their humanity pleading against principle?

I AM far, Sir, from insinuating, that you hold all the consequences which flow from the maxims you seem to entertain, namely, that temporal penalties may be employed in promoting truth and suppressing error: it is sufficient for me to observe, that all those positions must be erroneous, from which such consequences naturally follow.——I am, Sir, &c.

L E T T E R III.

S I R,

THOUGH the reasoning in my last letter, may be applied to the case of apostacy, as well as heresy; the case of renouncing Christianity, or professing Deism; yet as you have advanced some particular arguments for inflicting human punishment upon infidels, I shall take the liberty to give what you have offered a distinct consideration; because, I apprehend, it would be dishonourable to the Christian religion to be even suspected to owe its preservation, not to its own excellence and evidence, and the special protection of Providence, but to the terror of penal laws, and the sword of the civil magistrate.

HAVING premised, that "the loss of life is a heavier penalty than the crime of apostacy deserves," you remark that "about the close of the last century, the civil liberties to which we were then restored, being used as a cloak of maliciousness, and the most horrid doctrines, subversive of all religion being publicly avowed both in discourse and writings, it was found necessary again" (the punishment of death for this crime being become obsolete) "for the civil power to interpose, by not admitting these miscreants" (explained in the margin by *me-croyantz*, the French word used in our antient laws for unbelievers) "to the privileges of society, who maintained such principles as destroyed all moral obligation." To this end, you say, "it was enacted by a statute 9 and 10 Will. III. c. 32. that if any person educated in, or having made profession of, the christian religion, shall, by writing, printing, teaching, or advised speaking, deny the Christian religion to be true, or the holy scriptures to be of divine authority, he shall for the first offence, be rendered incapable to hold any office or place of trust; and, for the second, be rendered incapable of

“ bringing any action, being guardian, executor, legatee, or
 “ purchaser of lands and shall suffer three years imprisonment
 “ without bail :” the same penalties, which have been already
 mentioned, as by this very statute inflicted on Arianism.—And
 you had just before observed, that “ all affronts to Christianity,
 “ or endeavours to depreciate its efficacy, are highly deserving
 “ of human punishment*.”

I HAVE already shewn, that principles or sentiments relating to religion are not punishable by penal laws. The infliction of such punishment, even when they are professed, is out of the magistrate’s province; as, when they are concealed, it is out of his power; for human laws have nothing to do with mere principles, but only with those overt acts arising from them, which are contrary to the peace and good order of society.

BUT

* Comment. vol. iv. p. 44. In the new edition this passage is thus altered :
 “ All affronts to Christianity, or endeavours to depreciate its efficacy, in those
 “ who have once professed it, are highly deserving of censure.” If by *censure*
 the author means *blame*, as I think he means when he opposes it to human pun-
 ishment; this is a very material amendment; which affords ground to sup-
 pose, he would have given a different turn to the immediately subsequent words,
 if he had considered them with due attention: “ But yet,” saith he, “ the loss
 “ of life is a heavier penalty than the offence, taken in a civil light deserves.”
 An observation, which implies, I think, notwithstanding the preceding con-
 ception, that human punishment may be inflicted, though it ought not to be capi-
 tal. And therefore I apprehend, that upon further reflection the worthy Com-
 mentator will alter these words, for the same reason that he altered the former;
 for I cannot suppose, so candid and respectable a writer, will retain any phrase-
 ology which seems evidently to imply, that he will no longer venture to affirm.

If indeed any one should suggest, that the word *censure*, in the connection in which it stands with the subsequent clause, is designed to convey the same idea with the exploded phrase, *human punishment* only in a more covert, and there-
 fore less offensive manner; I think it would be an uncandid and indecent re-
 flection upon a gentleman, who doubtless is incapable of aiming to impose up-
 on his readers by studied ambiguity of expression. And therefore, I repeat, that
 I have no doubt this passage will, upon another review, be so modelled, as to be
 liable to no possible misconstruction.

BUT it will be said, Hath the magistrate no concern with those principles which "destroy the foundation of moral obligation?" that is, if I understand you right, which have a tendency to introduce immorality and licentiousness.

I ALLOW, he may encourage amongst all sects, those general principles of religion and morality, on which the happiness of society depends. This he may, and should do, as *conservator* of the public weal. But with regard to the belief or disbelief of religious principles, or religious systems; if he presumes to exercise his *authority* as a *judge*, in such cases, with a view of restraining and punishing those who embrace and profess what he dislikes, or dislike and explode what he embraces, on account of the supposed ill tendency of their principles; he goes beyond his province, which is confined to those effects of such principles, that is, to those actions, which affect the peace and good order of society; and every step he takes, he is in danger of trampling on the rights of conscience, and of invading the prerogative of the only arbiter of conscience, to whom alone men are accountable for professing or not professing, religious sentiments and principles.

FOR, if the magistrate be possessed of a power to restrain and punish any principles relating to religion because of their tendency, and he be the judge of that tendency; as he must be, if he be vested with authority to punish on that account; religious liberty is entirely at an end; or, which is the same thing, is under the controul, and at the mercy of the magistrate, according as he shall think the tenets in question affect the foundation of moral obligation, or are favourable or unfavourable to religion and morality. But if the line be drawn between mere religious principle and the tendency of it, on the one hand; and those overt acts which affect the public peace and order, on the other; and if the latter alone be assigned to the jurisdiction of the magistrate, as being guardian of the peace of society in this world, and the former, as interfering only with a future world, be referred

ferred to a man's own conscience, and to God, the only sovereign Lord of conscience ; the boundaries between civil power and liberty, in religious matters, are clearly marked and determined ; and the latter will not be wider or narrower, or just nothing at all according to the magistrates opinion of the good or bad tendency of principles.

IF it be objected, that when the tendency of principles is unfavourable to the peace and good order of society, as it may be, it is the magistrates duty then, and for that reason, to restrain them by penal laws : I reply, that the tendency of principles, though it be *unfavourable*, is not *prejudicial* to society, till it issues in some *overt acts* against the public peace and order ; and when it does, then the magistrate's authority to punish commences ; that is, he may punish the *overt acts*, but not the *tendency*, which is not actually hurtful ; and, therefore, his penal laws should be directed against *overt acts only*, which are detrimental to the peace and good order of society, let them spring from what principles they will ; and not against *principles*, or the *tendency* of principles.

THE distinction between the tendency of principles, and the *overt acts* arising from them is, and cannot but be, obliterated in many cases of a *civil* nature ; in order to determine the bounds of the magistrate's power, or at least to limit the exercise of it, in such cases. It would not be difficult to mention customs and manners, as well as principles, which have a tendency unfavourable to society ; and which, nevertheless, cannot be restrained by penal laws, except with the total destruction of civil liberty. And here, the magistrate must be contented with pointing his penal laws against the evil *overt acts* resulting from them. In the same manner he should act in regard to men's professing, or rejecting, religious principles or systems. Punishing a man for the *tendency* of his principles, is punishing him *before he is guilty*, for fear he *should be guilty*.

BESIDES, if the magistrate in one country hath a right to punish

nish those who reject the religion which is there publicly professed, the magistrates of all other countries must have the same right; and for the same reason, namely, to guard against the evil tendency of renouncing a religion, the maintenance of which they think of great importance to society. If those persons who reject Christianity are to be punished in England, those who embrace it are to be punished in Turkey. This is the necessary consequence of allowing any penal laws to be enacted, and to operate, in support or suppression of any religious system; for the magistrate must and will use his power according to his own religious persuasion.

IF it be said, that punishment is not to be inflicted on the mere entertaining, but only on the zealous propagating, of the principles of infidelity; it should be considered, that the propagation of Christianity would, on this maxim, be obstructed, and even precluded, where a different religion already prevails, by making it the duty of the magistrate to oppose it, and punish those who attempt it.

BUT having asserted, that “ all affronts to Christianity or endeavours to depreciate its efficacy, are highly deserving of human punishment,” or punishment from the magistrate, you endeavour to prove your position by the following observation: That “ the belief of a future state of rewards and punishments, the entertaining just ideas of the moral attributes of the Supreme Being, and a firm persuasion that he superintends, and will finally compensate, every action in human life, (all which are clearly revealed in the doctrines, and forcibly inculcated, by the precepts of our Saviour Christ) these are the grand foundation of all judicial oaths, which call God to witness the truth of those facts which perhaps may be only known to him and the party attesting. All moral evidence, therefore, all confidence in human veracity,” you say, “ must be weakened by irreligion, and overthrown by infidelity*.”

IF

* Comment. vol. iv. p 43, 44. In the late edition it is thus altered; “ weakened

IF by infidelity you mean disbelief of Christianity, then it will be a fair inference from this last assertion, that there can be no human faith, no mutual confidence, no bond of society, and no civil government, in countries which are not Christian. But the fact is otherwise; and the reason is, because there are some principles of religion and morality prevailing even in Mohammedan and heathen countries; and those right principles, tho' greatly short of a religious system, and blended with many erroneous, absurd, superstitious principles; yet, have sufficient influence in general on the minds of those who embrace them, to answer, tolerably at least, the purposes of civil government, and of mutual confidence and commerce.

I ADMIT, that, provided every one who revolts from Christianity to Deism renounced, together with his former profession, all those principles of natural religion on which the obligation of judicial oaths is founded, (and possibly you understand infidelity in this extensive sense, when you speak of its "overthrowing all human confidence"): if, I say, he were known to have renounced these principles, your argument would be *so far* good, that his oath would deserve no credit, and he would be subjected to innumerable inconveniences and incapacities, which his being destitute of the firm confidence of other men, and being discredited in his judicial oaths, would naturally and necessarily bring upon him: and indeed, such an absolute infidel as to all religion, natural as well as revealed, if proved to be so, should not be admitted to take an oath in a court of judicature. But as for inflicting any *positive punishment* upon him, merely for rejecting right *principles*, or espousing wrong ones, while this does not issue in those *actions* which call for punishment; *that*, I think, for the reasons already assigned, is beyond the province and jurisdiction of the magistrate.

IN

"ened by apostacy, and overthrown by total infidelity :" an alteration which supersedes the remark in the next paragraph, but leaves all that follows in its full force.

IN what I have just now said, I have supposed these unbelievers of Christianity to reject the great principles of natural as well as revealed religion; which, you rightly tell us, are the grand foundation of all judicial oaths. But the truth is, many who profess not to believe revelation, may possibly believe those principles as firmly as some nominal Christians, whose depositions on oath are not scrupled in courts of judicature. The belief of a God, the moral governor of the world, the searcher of hearts, the infallible judge, rewarder and punisher of human actions, is, as you observe, the only foundation of a judicial oath; and if men *do* believe these articles, they should not be made liable to that punishment, which, on your own state of the case, is due only to those who *do not* believe them; they should not be punished, I say, when they *do* believe them, merely because they believe them upon reasons independent of their "being clearly "revealed in the doctrines of Christ;" for their believing them is all that your argument requires.

INDEED, we have a ceremony in administering a judicial oath, which supposes a belief of the Christian religion. But that is by no means a necessary, essential part of a solemn judicial appeal to heaven; and can afford, therefore, no plea for punishing those who do not believe Christianity, as incapable of a judicial oath, (supposing that a proper reason for punishment;) because it is obvious, the end may be answered by an appeal to God in some other solemn form, without this ceremony; and our laws have set an example of it in the case of the Quakers*.

X

I F

* I am obliged to my learned friend Mr. Dodson for the following accurate remark. The case of the Quakers, saith he, doth not, I think, reach the point: for in the form of affirmation now used by them, there is no direct appeal to God, as there is in that prescribed by 7 & 8 W. III. c. 34. which was altered by 8 Geo. I. c. 6. And in criminal cases they are not admitted as witnesses, unless they will be sworn. The case of the Jews is much more applicable. They have been long admitted as witnesses; and are sworn upon the Pentateuch;

IF it be enquired, whether men shall be suffered with impunity to “*affront Christianity and deprecate its efficacy*,” by reproaches and calumnies, offensive to every Christian; a different case from simply disbelieving, or modestly opposing it: I answer, that, provided it be unwarrantable to support the belief of Christianity, and to confute its opposers, by penal laws and the sword of the magistrate; its professors should be exceeding tender how they animadvert, in this way, on the *manner* in which the opposition to it is made: a thing, comparatively of little consequence. For, though calumny and slander, when affecting our fellow-men, are punishable by law; for this plain reason, because an injury is done, and a damage sustained, and a reparation therefore due to the injured party; yet, this reason cannot hold where God and the Redeemer are concerned; who can sustain no injury from low malice and scurrilous invective; nor can any reparation be made to them by temporal penalties; for these can work no conviction or repentance in the mind of the offender; and if he continue impenitent and incorrigible, he will receive his condign punishment in the day of final retribution. *Affronting Christianity, therefore, does not come under the magistrate's*

touch; which method of swearing them is recognized by 10 Geo. I. c. 4. s. 18. and 13 Geo. II. c. 7. s. 3. And it is very observable, that the testimony of persons of the Gentoo religion, upon oath, taken in the manner used in their country, was admitted in the court of Chancery by Lord Hardwicke in the case of Omichund and Barker, Feb. 23, 1744; in which case he was assisted by Lee and Willes, Chief Justices, and Parker, Chief Baron, and the matter was determined upon very great deliberation. See a large account of the arguments of the Lord Chancellor and Judges, in 2 Equ. Cas. abr. 397—412. In the third book of his invaluable Commentaries, chap. 27. Mr. Justice Blackstone cites this case from 1 Atkins 21. and states it thus: ‘it hath been held that the deposition of an heathen, who *believes in the Supreme Being*, taken by commission in the most solemn manner, according to the custom of his own country, may be read in evidence. See Lord Chief Justice Hale's opinion as to the admissibility of witnesses not being Christians, in 2 Hist. Pl. Cor. 279, which was cited and greatly relied on in the case of Omichund and Barker.

gistrate's cognizance, in this particular view, as it implies an offence against God and Christ*.

X 2

IF

* It hath been observed, that upon the same principles which are laid down in this paragraph, no profane swearing, blasphemy, or breach of the Sabbath, however flagrant, ought to come under the cognizance of the magistrate. But this objection is grounded, I apprehend, upon a mistake; namely, that the reasoning in this passage is intended as an absolute proof, that affronting Christianity is not to be punished; whereas it is solely designed to shew, that it is not punishable in *this particular view*, as an offence against God. Whether it be punishable in any other, is a point afterwards considered. Now it is an observation, and a very just one, of bishop Warburton (Alliance, book I. ch. 4. p. 33, 34. edit. 4.) that the magistrate punishes no bad actions, as sins or offences against God, but only as crimes injurious to, or having a malignant influence on society. Accordingly the crimes mentioned in the objection do not, any more than affronting Christianity, come under the magistrate's cognizance in this particular view: from whence, however, it by no means follows, that they may not come under his cognizance in some others. And I really think, it can be no invasion of any man's right of private judgment, and of the most unlimited privilege of propagating his sentiments concerning religion, in the manner in which he thinks most conducive to that end, if, from a regard to decency and the good order of society, the magistrate do prohibit and punish profane swearing, blasphemy, and breach of the sabbath. For it is certain, that, by these practices, no one pretends to prove any supposed truths, or detect any supposed errors, or advance any sentiments whatsoever: whereas, on the contrary, in opposing Christianity, an infidel who thinks he is detecting an imposture, may conceive it conducive to the strength of his argument, and to the conviction of others, to set it in such a light as Christians will apprehend to be scurrilous and indecent; and in such cases it will be exceeding difficult to separate the manner of opposition from the opposition itself, and for the magistrate to punish the former while he permits the latter. But there is no such difficulty in the cases here mentioned, common swearing, blasphemy, and breach of the sabbath. In respect to which I must however suggest this caution, that they ought to be very clearly and distinctly defined; and in particular, blasphemy; since the idea of that, if it be extended further than to something like common swearing, may possibly be extended so far, that laws for the punishment of it may be easily turned to the destruction of all religious liberty: for what is blasphemy, in the general sense of the term, but uttering something dishonourable or injurious to the Divine Being? And what controverted religious sentiment is there, which under this general notion, by a court and jury of bigots, may not be condemned as blasphemy? The Athanasiian sliles the Arian a blasphemer,

IF you say, that insulting and reviling religion is very offensive to good men, and ought, on that account, to be prohibited and punished: I observe, so are all transgressions of the divine law; very offensive to good men; but they are not, for that reason, all punishable by the magistrate. In the case of gross lying, heinous ingratitude, and many other vices which might be mentioned, though no one thinks of applying to a court of justice on the occasion, yet every good man will treat these vices, and those who are guilty of them, with just abhorrence and detestation. And the same, and no other, I apprehend, should be their conduct, when infidels, with an offensive indecency, vent their impotent rancour against the religion of Jesus.

IF you alledge, that this licentious manner of treating religion, will “depreciate its efficacy” on the minds of men, especially of the undiscerning and thoughtless, which are commonly the major part: I answer, that the contempt and abuse which infidels throw upon religion, will, in the end, entail disgrace and infamy on themselves. Their ribaldry and scurrility will be despicable and disgraceful to the more sensible part of our species; and while there are Christians, especially Christian ministers, in the world, I trust, there will always be proper persons, who will expose to the most ignorant and unreflecting, the gross folly and injustice of such abuse; and render those who are guilty of it

the

mer, the Arian the Athanasian, the Calvinist the Arminian, the Arminian the Calvinist; and thus the same laws, differently applied as different parties prevail, will prove fatal to the religious liberty of all of them in their turn.—And with respect to breach of the sabbath, the penal laws against it should be rather of the negative than of the positive kind, and should only lay restraints on civil liberty in cases which may be offensive or injurious to society; for instance, they may extend to the prohibition of public diversions, of the prosecution of trade and business, and the like. Upon these principles, and with these restrictions, the magistrate, I think, may make regulations in the cases here mentioned, with a view to the good order of society, without entertaining the least idea of punishing offences against God, and without invading religious liberty, and the most unlimited rights of conscience.

the objects of contempt to the lowest of the people: whereas, if punished by the magistrate, they would be the objects, probably, of their pity: a circumstance which would procure their insinuations and suggestions to the prejudice of religion, a much more favourable reception, than they would otherwise be like to obtain.

INDEED, discovering a disposition to take refuge in temporal penalties, whenever any persons in discourse or writings misrepresent and revile (or, as you stile it, *affront*) our holy religion, and deprecate its efficacy, is acting as if we apprehended the cause had no other and better support. Whereas, for three hundred years after its first promulgation, Christianity maintained its full reputation and influence, though attacked in every way which wit or malice could invent) not only without the assistance of, but in direct opposition to the civil power. It shone with the brighter lustre, for the attempts to eclipse it. And the insults and calumnies of its enemies were as ineffectual to its prejudice, as either their objections, or what were more to be feared, their persecutions. And as it was during that period, so will it always be, if there be any ground to rely on that promise of our blessed Saviour concerning his church, that “ the gates of hell “ shall not prevail against it*.”

IN the mean time, compassion to all ignorant, petulant, malicious adversaries of our holy religion; and a desire to obviate the mischief they do, by refuting their arguments, exposing their petulance and malice, and if possible, working conviction in their minds; are the dispositions which such contemptible attacks on the honour of the christian religion, and its author, should excite in his genuine disciples. We should argue with such men, not persecute them; should endeavour to rescue others from the danger of being infected by their principles, with cool reasoning; but we should be careful how we attempt to punish them, lest we *harden* instead of reclaiming them: lest we leave

* Matth. xvi. 18.

leave room for others to imagine, that not their scoffs and insults, but their *arguments*, have *provoked us* by being unanswerable. And indeed, provided it be wrong to animadver^t, by temporal penalties, on the calm reasoning of infidels against Christianity; it would, surely, be *imprudent* to punish them for what renders their arguments, if there be any, *lets* formidable and prejudicial; I mean, their revilings and scurrillity. It is *imprudent* I say, by a prosecution, to hold up to public notice, to introduce into all conversation, and excite people's curiosity after, those scurrilous writings, which would otherwise quickly sink with their authors into perpetual oblivion. Many infidels, in modern times, have united their efforts against the Christian religion; and they have railed, at least some of them, much more than they have reasoned; but they have been heard, and confuted; and most of them are only remembered by the excellent apologies for Christianity, which they have been the occasions of producing. I hardly think they and their works would have been so soon forgotten; I am sure, our religion would not have received such honour, nor infidelity such disgrace, and such a total defeat; if instead of being answered by the learned writers, who have employed their abilities to so laudable a purpose, they had been prosecuted, fined, imprisoned, or suffered any other ignominious or cruel punishment, by the sentence of the magistrate. Those who call for the aid of the civil power, and for the infliction of pains and penalties, in support of the Christian religion, forget the character and conduct of its divine author; who when his apostles, out of zeal for his honour, would have invoked fire from heaven on the unbelieving Samaritans, because they had just *affronted* him, severely rebuked them: “Ye know “ not what manner of spirit ye are of; the Son of man came not “ to destroy men’s lives, but to save them*.

IN what I have said, let it not be supposed, that I have pleaded the cause of infidelity; No; I have pleaded that of Christianity, in my

my own opinion at least; the mild and forbearing spirit of which religion, I desire more and more to imbibe, to regard its doctrines and precepts as the rule of my faith and manners, its promises as the foundation of my hopes, and the scheme of recompence through Jesus Christ as my highest consolation and joy. It is indeed, from my reverence for it, and attachment to it, and zeal for its true dignity and honour, that I will ever vindicate it from the *least suspicion* of being a persecuting religion: A suspicion, which, if it were just, would be a greater brand of ignominy, and do it more real discredit, than all the invurious representations and calumnies of its adversaries. And this it becomes those seriously to consider, who would wipe away the dis-honour done it, by methods that would double the disgrace, not only on themselves, but on the noble cause which they profess to espouse.—I am, Sir, &c.

† Several writers of the first rank amongst those who have appeared in defence of Christianity, have declared openly, and argued strongly, against the persecution of infidels: particularly Dr. Lardner, in his preface to his excellent “Vindication of three miracles of our Saviour against Wolton;” and in two “Letters to the Bishop of Chichester,” published in the late “Memoirs of his life;” Dr. Chandler, in his preface to the “Conduct of the modern Deists;” and Mr. Simon Brown, in his preface to a very shrewd and sensible pamphlet against Wolton, which he styles “A fit rebuke to a ludicrous infidel.” The performances of these writers shew, that they perfectly *understood* the strength of their cause; and their aversion to the interposition of the civil power, that they altogether *relied* upon it, having no apprehensions of the consequences of a free debate, managed in any way the patrons of infidelity should think proper. Indeed, no one ever made the attack in a more rude and scurrilous manner than Wolton: they, however, contented themselves with confuting his arguments and exposing his scurrillity, entering their protest, with convincing reasons, against the prosecution of him. And this conduct I cannot help thinking very much to the honour of the Christian religion and its advocates.

L E T T E R IV.

S I R,

WHEN you mention the statute 1 Eliz. c. 2. which enacts, that “ if any person whatsoever shall, in plays, songs, or other open words, speak any thing in derogation, depraving, or despising of the common prayer, he shall forfeit for the first offence an hundred marks, for the second offence four hundred, and for the third offence shall forfeit all his goods and chattels, and suffer imprisonment for life* :” I say, when you speak of this statute, you not only approve of it in the peculiar circumstances of the time when it was first enacted, but you say, that “ the continuance of it to this time cannot be thought too severe or intollerant†.” And the reason you assign is,

* The express words of this statute called the act of Uniformity, are, That if any person or persons whatsoever—shall in any interludes, plays, songs, rhymes, or by other *open words* *declare* or *speak* any thing in the derogation, depraving or despising of the fane book (the common prayer) or of *any thing* *therein contained*, or *any part thereof*—every such person shall forfeit for the first offence an hundred marks, &c. as above.

The clauses preceding that last mentioned enact, That if any parson, vicar, or other minister—shall preach, declare, or speak, any thing in the derogation or depraving of the said book, or any thing therein contained, or any part thereof, he shall for the first offence forfeit the next year’s profit of all his benefices, and suffer imprisonment for six months; for the second offence shall suffer a year’s imprisonment, and be deprived ipso facto of all his spiritual promotions; and for the third offence shall be in like manner deprived, and imprisoned during life. If the person offending, have no benefice, nor any spiritual promotion, he shall for the first offence suffer one year’s imprisonment, and for the second offence imprisonment for life.

† Comment. vol. iv. p. 50, 51. In the new edition the author expresses himself thus: “ The continuance of it to the present time, in terrorem at least, cannot be thought too severe or intollerant”. He also assigns some other reasons for his opinion, than those which are mentioned above; and they are all considered in a postscript to this letter.

is, that "no one in present circumstances can do this," that is, "revile" the liturgy (the crime to which alone you suppose the act to refer) "from any laudable motive, not even from a mis-taken zeal for reformation; it being, since the union, extremely unadvisable to make any alterations in the service of the church*.

Now, supposing that a man cannot have any "laudable motive for reviling and inveighing with bitterness against the common prayer," (for against this only, I say, you understand the act to be levelled): supposing it to be a thing very culpable; yet, what is the specific nature of the crime, and wherein doth the malignity of it consist? "It is a crime," you say, "of a grosser nature than mere nonconformity: because it carries with it the utmost indecency, arrogance, and ingratitude: indecency, by setting up private judgment in opposition to public; arrogance, by treating with contempt and rudeness what hath at least a better chance to be right, than the singular notions of any particular man; and ingratitude, by denying that indulgence and liberty of conscience to the members of the national church which the retainers to every petty conventicle † enjoy†."

This crime of reviling the liturgy, I perceive is a very complicated one; "it carries with it," you say, "the utmost indecency, arrogance, and ingratitude". For each of which you assign a particular reason; and I shall examine them all in their order.

Y

THAT

* This argument against alterations, taken from the union, will be considered particularly in a subsequent letter.

† Dr. Priestley hath remarked a want of elegance and politeness in this expression, unworthy of a fine writer, (Remarks p. 31.) I would observe an impropriety in it, unbecoming the great lawyer. The word conventicle, if I understand it right, means an unlawful assembly; and is therefore improperly applied, as it is here, to the legal assembly of Protestant Dissenters.

‡ Comment. vol. iv. p. 50.

THAT reviling any thing, that treating with rudeness and contempt any man, much more a considerable body of men, or, the public at large, or those religious forms which are used under the sanction of the civil magistrate, and by many revered, is *indecent*, will be readily allowed. The rules of civility and good manners ought always to be observed; especially where the public, and persons in authority, are concerned. Never to violate them, if possible, is in itself right; and is also good policy; for any cause, instead of being diserved, will be recommended and promoted, by being defended with civility and good temper.

BUT I cannot help suspecting, Sir, that your view reaches further than this; if this be all you mean, I do not conceive why the indecency of reviling the liturgy is, particularly, said to arise from “ setting up private judgment in opposition to publick* :” I say, your putting the indecency of it on this footing, appears to me to be accounted for only by supposing, that you think it wrong to oppose private to public judgment, in any case; and then nonconformity and reviling the liturgy are both indecent; for the same reason, because they are an opposition of the private to the public judgment; only one is more so than the other, and consequently more indecent. And I the rather apprehend I am herein not very wide of your sentiment, because

you

* In the last edition the author styles it “ setting up private judgment in *virulent and factious* opposition to public authority.” As far as reviling the liturgy implies an opposition which is “ *virulent and factious*,” I own it cannot be justified. But as far as it is a mere “ setting up private judgment in opposition to public authority,” it may; for whether it be styled “ public authority” or “ public judgment,” I think it comes to much the same. I suppose, the learned author would have this authority always united with, and under the influence of *judgment*: whether it be so or not, is another question. If he is of opinion, that *mere* authority ought to be submitted to in matters of religion, I beg leave to enter my dissent from such a position, for reasons assigned in my second letter, and to believe that every man is bound in such cases, to judge and act for himself, without regard to any human authority whatsoever.

you consider nonconformity as a crime, though not so great as that of reviling the liturgy ; and you so consider it, I imagine, on this particular account, as it is private judgment opposed to the public.

AND indeed, if it be a general maxim, that it is *indecent* to “ set up private judgment in opposition to public ;” then it is certainly so, to dissent from public or established opinions and practices: then all those who have been the authors of any reformatiōns or improvements, in religion, in philosophy*, in poli-

Y 2

cy,

* The *public judgment* of the church of Rome hath condemned for heresy the doctrine of the motion of the earth according to the system of Copernicus ; notwithstanding which it hath long passed for orthodoxy in the *private judgment* of all philosophers. The famous Galileo, having taught this point, and confirmed it by new discoveries, was imprisoned in the inquisition on that account, obliged to recant and curse his former opinion, and swear that he would not teach it any more ; but that if he should know of any such heretic, or any person suspected of such heresy, he would immediately report him to the holy office. *Gallilaii system.* *Colinie.* edit. *Lugd. Bat* 1699. p. 483—494. Such a fatal operation had this *public judgment* formerly, in a point of *philosophy*, capable of demonstration, and now universally received. And the influence of it, tho' it be privately rejected by every individual, appears in the public *profession* of philosophers even in modern times. Two learned Romish priests and able mathematicians, publishing an edition of Sir Isaac Newton's *Principia*, with an excellent *Commentary*, in which his principles are explained and more fully demonstrated (the *missum* or advertisement to the third book of which is dated at Rome 1742), thought it necessary, for their safety I suppose, before they entered upon the heretical doctrine *De systemate mundi*, to make, in form, the following curious declaration ; than which, however it was designed, there never surely was a greater burlesque upon servile submission to public judgment.

PP. Le Seur & Jacquier declaratio.

Newtonus, in hoc tertio libro, telluris motæ hypothesis assumit. Autoris propositiones aliter explicari non poterant, nisi eādem quoque facta hypothesis. Hinc alienam coaetū funus gerere personam. Cæterum latis à summis Pontificibus contra telluris motum decretis nos obsequi profitemur.

The declaration of the fathers Le Sieur and Jacquier.

Newton, in this third book, assumes the hypothesis of the earth's motion. The Author's propositions could not be explained, if we did not also go upon the

cy, and in the manners and conduct of life, contrary to the public standard, have been guilty of indecency.

BESIDES, it is worth observation, that the public judgment, to which it is expected such deference should be paid, amounts to no more than the vote of those who happen to be invested with power, at the time such establishments are made; which is sometimes very different from the opinion or judgment of the public at *that time*, and frequently differs widely from the judgment of the public in a *subsequent period*. But the unhappiness is, that, when the thing established, be it what it will, hath received the sanction of public authority, neither numbers, nor the respectable characters of those who disapprove it, can easily procure a reform; and even when it is in a manner grown out of all credit, so as to be espoused by very few, it still passes under the denomination of “the public judgment,” against which it is “indecency to oppose the private judgment of individuals.”

BUT

the same hypothesis. Upon this account we have been obliged to appear under a feigned character. We profess, however, to follow the decrees issued by the sovereign pontiffs against the motion of the earth.

† If the Athanasian Creed, with its damnatory clauses, were now a candidate for admission into the public formulary, it would doubtless be rejected by a very large majority, both of clergy and laity; and yet it remains one of those things which are authorised by the *public judgment*.

It may not be amiss to observe, that there is not only a reluctance to making alterations in material points, but sometimes even to the appearance of making any in matters of common form: of which I think the following is a remarkable instance.

The 36th article asserts, that “the book of consecration of archbishops and “ bishops, and ordering of priests and deacons, lately set forth in the time of “ Edward the VIth.” (in the second year of his reign, as the article afterwards faith) “ and confirmed at the same time by authority of parliament, doth con-“ tain all things necessary to such consecration and ordering, neither hath it “ any thing that of itself is superstitious and ungodly.”

The act of uniformity of Charles the II. enacts, “ That all subscriptions to “ the articles shall be construed and taken (for and touching the six and thir- “ tieth

BUT since a man's private judgment *may happen* to be in the right, and the public one in the wrong; whenever this be found or generally agreed, to be the case, he must make but an awkward

“ tieth article) to extend unto the book of Charles the IIId. in such sort and manner as the same did heretofore extend unto the book of Edward the VIth.”

Now this clause of the act of parliament either means to substitute the book of Charles the IIId. in the room of that of Edward the VIth. in which case, those who subscribe the article, are absurdly required by the words Edward the VIth. to understand Charles the IIId.: or it means to add the book of Charles the IIId. (though it is not mentioned in the article) to the book of Edward the VIth. and the subscription must be understood virtually to extend to both, as it doth expressly to the book of Edward the VIth. And this, I take to be the true sense of the article, from considering the last clause of it; namely, “ Who-“ soever are consecrated and ordered according to the rites of that book, since“ the second year of the aforesigned king Edward unto this time, or hereafter“ shall be consecrated or ordered, according to the same rites, we decree all“ such to be rightly, orderly, and lawfully, consecrated and ordered.” Now it can hardly be supposed, that it was the intention of the act of uniformity to set aside this approbation of the orders of the church from the reformation, and to substitute in the room of it only an approbation of the said orders from the time of Charles the IIId. It was rather doubtless intended to declare an approbation of both, and that the article should be hereafter extended to the book of Edward as well as the book of Charles, in like sort and manner as it had heretofore been extended to (an odd phrase! for it expressly mentions) the book of Edward only. And if this be the sense of the article, all who subscribe it must be understood according to the act of uniformity, as well as the express words of the article, to subscribe to a book which very few have seen, and which, though the article asserts there is nothing in it superstitious or ungodly, contains however an oath of supremacy, in which is the following clause, “ I“ will observe, kepe, mainteigne, and defende, the whole effectes and con-“ tentes of all and syngular actes and statutes made and TO BE MADE within“ this realme in derogacion, extirpacion, and extinguishement of the bishoptie of“ Rome and his authoritie, and all other actes and statutes made or TO BE“ MADE in reformacion and corroboracion of the kynges power, of the su-“ preme hed in yearth, of the churche of Englande.” &c.—“ And in case any“ othe BE MADE” (that is shall be made) “ or hath been made by me, to any“ person or persons, in maintenaunce, defence, or favoure of the bishoppe of“ Rome,

ward figure who gravely reprimands those that set up the former against the latter. I should think it, therefore, much better to come to the question at once: Is the thing in deliberation right
or

“ Rome, or his authoritie, jurisdiccion, or power, I repute the same, as vain
“ and adnichilate, so helpe me God, ALL SAINCTES AND THE HOLY
“ EV'ANGELIST.” See the forme and maner of makynge and consecratynge of archbischoppes, bishoppes, priestes, and deacons, 1549, folio; with the printer's name at the end: Richardus Grafton, typographus regius excudebat
mense Martii A. M. D. XLIX, cum privilegio ad imprimentum solum. A copy
of this edition, through the favour of my worthy friend, the Rev. Mr. Josiah
Thompson, jun. is at present in my possession; and is, by the date, of the same
impression with a copy of king Edward's ordinal mentioned by bishop Burnet,
in the preface to his third volume of the History of the Reformation, p. iv, v.
as in the Lambeth library.

But what I would principally remark, is, that it seemis very strange, if the parliament by the clause in the act of uniformity relative to the 36th article, intended a substitution of the book of Charles the 1st. instead of this book of Edward the VIth. that they had not altered the words of the article to that sense; or, if they meant, as I rather think, to include the book of Charles in the subscription, as well as the book of Edward, that they did not add a clause to the article, expressly mentioning the book of Charles the 1st. This, I think, can only be accounted for by supposing, that rather than appear to make an alteration in the article, they would substitute one book for the other, or rather add one to the other, not by inserting a clause for that purpose in the article, but by an arbitrary construction, altering the sense of the article, while they retained the words.

If it be said, that the parliament wou'd not alter the words of an article which had passed the convocation of Elizabeth, without the previous sanction of that body; it amounts to a charge of the most absurd scrupulosity in the whole world, that they would venture to alter the sense of convocation, but not the expressions. But this can hardly be the true reason, the authority of parliament having been always regarded since the reformation as sufficient to make laws in ecclesiastical matters, without the convocation; whereas the convocation can make no laws at all, nor hath any authority without the parliament.

It is observable, that bishop Hooper, who is often mentioned as refusing to be consecrated on account of the popish vestments, objected likewise to taking the oath of supremacy abovementioned, required by the book of Edward, on account of the clause which concludes, So helpe me God, all sainctes, &c. which he thought superfluous and impious; and he argued the point before
the

or wrong? for the opinion, neither of men in power, nor of the majority, is the test of truth, or the rule of our faith or practice.

So that the particular reason on which you ground the “ indecency of reviling the liturgy,” namely, that it is “ setting up private judgment in opposition to public;” appears to me to be very inadequate and unsatisfactory.

THE next article in the composition of this crime, namely, reviling the common prayer; is, you say, “ arrogance.” It is “ arrogant to treat with rudeness and contempt what hath a better chance to be right, than the singular notions of any particular man.”

IN using the phrase, “ the singular notions of a particular man,” you put the case very favourably for drawing your own conclusion. To be sure, if a man adopts sentiments which never entered into any body’s head but his own, or which no one will embrace when proposed, the odds are against him.

But

the king and council so much to the satisfaction of that pious and sensible young prince, that he struck out the words with his own hand Burnet’s Hist. of Reform. vol. iii. p. 202, 203. 751. Accordingly we find, that in the next edition of the ordinal, which came out by authority of parliament in the year 1552, the oath concludes thus; So helpe me God through Jesus Christ. Being excused from swearing in the superstitious form to which he objected. Hooper was consecrated, the matter relating to the vestments being compromised. Fox’s Acts and Monuments, vol. ii. p. 120. edit. 1684 and especially the Latin edition, or the quotation from it in Pierce’s vindication of the Dissenters, p. 30.

It should be observed, that bishop Burnet hath committed a mistake, in printing among his records the oath of supremacy made by the bishops when they did homage to Henry the VIIIth. as the oath tendered to Hooper at his consecration; that oath was different from the oath of supremacy required to be taken by bishops at consecration, in king Edward’s ordinal; in particular, it had not the clause in which they swear to acts that *shall be made* and that they hold to be void, certain oaths they *may hereafter take*; though they both conclude with nearly the same form of adjuration, So helpe me God. all sanctes, and the holy evangels.

But this is not often the case; and is not so, in particular, with regard to the debate between the church and the Dissenters; the point here in question. However, he who treats the notions of others with a rude contempt, does, I think, in most cases, appear to affect a sort of superiority, (call it arrogance, or insolence, if you please) which usually ill becomes him who assumes it, and is never very agreeable to those who are the objects of it.

BUT with relation to the query, Who have the fairest chance of being in the right? those who follow the lead of a public establishment? or those who are, or profess to be, impartial enquirers after truth? that, I think, is not so clear, at least on one side of the question, as you seem to imagine. Most establishments, even those which have been settled by authority of the civil power, have originated from the clergy; at least with respect to their formularies of doctrine and worship; and the magistrate hath had little more to do in the affair, than to establish what hath been already prepared to his hands. Let us, then, look into ecclesiastical history, and see what the councils, synods, convocations, and other general, national, or provincial assemblies of the clergy, have, for the most part, been, from the first famous and revered council of Nice, down to the last session of our own convocation in England. When I reflect on the policy and artifice used in the management of such assemblies; on their obsequiousness to the caprices of princes, and ministers of state, or of potent ecclesiastics, and even of some of their own ambitious and turbulent members; on their prejudices and passions, their private and party views, their scandalous animosities and contentions; on the small majorities by which questions of importance, intended to bind not only the men of that age but their posterity, have been determined†; on the respectable

† The cross in baptism, and kneeling at the communion, (which are imposed in the church of England as necessary to the administration of these ordinances) as well as the observation of saints days, and a few other ceremonies, were carried in the convocation of Elizabeth 1562 by a single proxy. The majority

able characters which have often appeared in the minor number; and above all, on their self-contradictions, and their mutual censures and anathemas: I say, when I consider these things, I

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own,

majority of those present, *against* them, was 43 against 35; but upon adding the proxies, the majority, *for* them, was 59 against 58. Thus they obtained the honour of the *public judgment* by this *better chance of being in the right*; and the contrary opinion was degraded into *private judgment*, though hardly so as to become the *singular notion of a particular man* Strype's Annals, vol. i. p. 337—339. edit. 3. Burnet's History of the Reformation, vol. iii. No. 74 among the Records, p 662—664. edit 1753.

† King William, in the first year of his reign, granted a commission to prepare alterations of the liturgy and canons, and proposals for the reformation of the ecclesiastical courts. In this commission, besides several others, there were such men as Tillotson, Stillingfleet, Burnet, Patrick, Tennison, Lloyd, Sharp, Kidder, Scot, Fowler. And they accordingly made very considerable alterations and improvements in the liturgy; which are highly commended by Dr. Nichols, in his *Defensio Ecclesiæ Anglicanae*, p. 94—97. and which Mr. Neal, in his *History of the Puritans*, saith, would, if they had been adopted, have brought in three parts in four of the dissenters; vol. ii. p. 804. edit. 4to. And this author was a good judge, since no one better understood their principles and dispositions. However, the convocation, when the matter was laid before them by a message from the crown, resolved to enter into no debates about alterations, would return no answer to that part of the king's message, and could hardly be brought to thank him for his promise of protection. Burnet's History of his own times, under the year 1689. In what a contemptible light does that majority in convocation appear, who would not so much as *hear* what was prepared for their consideration by *such celebrated divines*, the glory of the English church, acting under a royal commission! and who would not esteem it an honour to be found in such a minority! and yet their sentiments, outvoted by furious bigots, are now only *private judgment*!

‡ A few remarks upon the four first general councils, will be a sufficient illustration of what is here said. The council of Nice, held in the year of our Lord 325, consisted, we are told, of more than 300 bishops, “ brought together, some by the hope of gain, and others to see such a miracle of an emperor as Constantine;” who accordingly well rewarded them “ by his presents as well as his entertainments.” Euseb. in vit. Const. l. 3. c. 6. & 16. Sozom. l. 1. c. 25. p. 42. Theodorit. l. 1. c. 11. p. 36. Sabinus saith, that “ they were weak and illiterate men.” (vid. Socrat. l. 1. c. 8. p. 21. & c. 9. p. 31;) which might be true with regard to many of them. However, it is certain, all history

own they somewhat abate my reverence for the determinations of such bodies, and for the establishments founded by them, or by

history agreeing in it, that they were in general (polloi pleiones are the words of Socrates and Sozomen) very litigious and contentious; insomuch that the Emperor was obliged to interpose, to take them off from their private quarrels, and from their daily custom of presenting to him accusations against one another, before he could get them to attend to the business for which they were called together, (Euseb. de vit. Constant. l. 3. c. 13. Socrat. l. 1. c. 8. p. 20. Sozom l. 1. c. 17. p. 35. Theodorit. l. 1. c. 11. p. 37. Gelisius Cyzic. l. 2. c. 8); and when they did engage in it, their conduct was agreeable to their character; for the party accused having laid before them a written confession of their faith, they immediately tore it in pieces; and a great tumult arising, and those who presented the paper, being cried out upon as betrayers of the faith, were so terrified, that they all arose, except two, and were the first in condemning the sentiments and party they before espoused. Theodorit. l. 1. c. 7. p. 27. With such violence were matters carried in the council! And the unintelligible terms which they introduced into their creeds and definitions of faith, and imposed by dint of authority upon others, only served to increase and perpetuate the controversies then subsisting, and fill the world with mutual rage, and mutual persecutions. "The consequence of which was, " that the Christian religion, which, for 300 years after the ascension of Jesus, " had been spreading over a large part of Asia, Europe, and Africa, without " the assistance of secular power and church-authority, and at the convening " of the council of Nice, was almost every where through those countries in a " flourishing condition, in the space of another 300 years, or a little more, was " greatly corrupted in a large part of that extent, its glory debased, and its " light almost extinguished". Dr. Lardner's Credibil. vol. viii. p. 24. This council, we are informed by Socrates, l. 1. c. 11. p. 38, 39. by Sozomen, l. 1. c. 23. p. 41. and by Nicephorus Callistus, l. 8. c. 19. tom. 1. p. 571. was on the point of decreeing the celibacy of the clergy, if they had not been diverted from it by a spirited oration of Paphnutius, an Egyptian bishop; and perhaps by perceiving, that it was disagreeable to the emperor; as it probably was, if we may judge by the marks of singular respect which he shewed that bishop. Socrat. l. 1. c. 11. p. 38.

The next general council of Constantinople, in the year of our Lord 381, was called to confirm the decisions of the council of Nice, which had not in the least extinguished the rage of controversy. Previous to it, the emperor wrote to the inhabitants of that city, that he "would have all his subjects to be of " the same religion, which Peter, prince of the apostles, had from the begin- " ning delivered to the Romans, and which was now held by Damasus, bishop of

by the civil power in consequence of their resolvs; and I am apt to surmife, that a candid enquirer after truth would esteem

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it

of Rome, and Peter, bishop of Alexandria," Sozom. l. 7. c. 4. Justiniani Cod. I 1. tit. 1. §. 1. So respectable a father as Gregory Nazianzen, in a letter which he wrote to Procopius to excuse himself with the emperor for attending this council, saith, that he was " desirous of avoiding all synods, because he had never seen a good effect, or happy conclusion of any one of them; that they rather increased than lessened the evils they were designed to prevent. For the love of contention, and lust of power, were there manifested in instances innumerable." Operum tom. 1. p. 814. epist. 53. edit. Paris 1630. And what the good father said concerning former councils, not excepting the famous one of Nice, he found afterwards to be true of this council of Constantinople. " These conveyers of the Holy Ghost," saith he, " these preachers of peace to all men, grew so bitterly outrageous and glarorous against one another, in the midst of the church, bandying into parties, mutually accusing each other, leaping about as if they had been mad, under the furious impulse of a lust of power and dominion, as if they would have rent the whole world in pieces." He saith afterwards, that " this was not the effect of piety, but of a contention for thrones :" Ouk Eusebeian—Ten d'uper Thronon Erin. And he gives a strange account of their indecent behaviour, when he had just made a speech to them. " These furious young men were followed by the elder," saith he, " and ruled the council." Greg. Naz. de vit. sua, operum tom. 2. p. 25, 27.

The general council of Ephesus, A. D. 431, was called on this occasion. Nestorius was of opinion, that the two natures in Christ were not so united after the incarnation, as to occasion a mutual communication of properties. He therefore objected to calling the Virgin Mary Theotokos, the mother of God ; and would have her called Christotokos, the mother of Christ. Socrat. l. 7. c. 32. Concil. tom. 1. p. 1280. edit. Harduin. The design of the council of Ephesus was to settle this notable dispute; or rather to condemn Nestorius. When they met, Cyril of Alexandria, the avowed enemy of Nestorius, induced the bishops present, of his own party, to proceed with great precipitance and violence to the condemnation of Nestorius, before the arrival of John, bishop of Antioch, and the bishops who were with him; and that, in opposition to the protest of 60 or 70 bishops, and of the emperor's commissioner, whom they drove out of the assembly. Concil. tom. 1. p. 1351—1354. And then they sent an account of what they had done, inscribed. " To Nestorius, a second Judas." Concil. tom. 1. p. 1434. When John and his party arrived, they deposed Cyril; Concil. tom. 1. p. 1450—1455. and Cyril and his party, in return, deposed John; Concil. tom. 1. p. 1500. Evagr. l. 1. c. 5. p. 254, 255. And thus

it a much fairer chance for being in the right, to follow his own judgment; or, if any other, the judgment of a few serious, impartial,

thus there subsisted two councils, mutually condemning each other. To allay the storm, the emperor gave his sanction to the deposition of Nestorius, Cyril, and Memnon, an active partisan of Cyril's, (Concil. tom. 1. p. 1550. E. 1551. A. E. 1555. A.) and they were arrested by the Emperor's commissioner, p. 1555—1557. But he was afterwards brought (some say, by the money distributed amongst his courtiers by the deputies of Cyril, p. 1580. C) to alter his mind; to confirm, indeed, the deposition of Nestorius, whom he banished, (p. 1670. A.B.); but to restore Cyril and Memnon. Ever since Cyril, and his party have been esteemed the legitimate council of Ephesus. Isidorus of Pelusium in a letter to Cyril, treats him very justly as well as very freely, when he represents his conduct in this council to be that of a man pursuing only his own resentments. *Epiſtol. 1. 1. epift. 310. operum edit. Paris 1638.*

The fourth general council of Chalcedon, A. D. 451. was occasioned by the extraordinary transactions of a council of Ephesus in the year 449, of which Dioscorus bishop of Alexandria, was president; and in which the doctrine of the two natures in Christ after the incarnation was condemned, and the contrary doctrine of Eutyches affirmed. The menaces of the president, together with the soldiers and monks, who surrounded the council, terrified the whole assembly. Concil. tom. 2. p. 213. C. D. and Flavianus, bishop of Constantinople, who had condemned Eutyches, being accused by the president, and declared to be anathematized and deposed; and appealing therefore from him, and some bishops at the same time interposing in his behalf; the president started up, and sternly called for the emperor's commissioners, by whose command the proconsul of Asia came in with the military, and a confu'ed mob with chains and clubs and swords. Concil. tom. 2. p. 216. and some bishops not willing to declare, and others flying away, he cried out, “If any one refuses to sign, ‘with me he hath to contend;’” (tom. 2. p. 215. B.) and then he and another bishop carried about a blank paper, (Concil. tom. 2. p. 80. E. p. 91. D. E. p. 101. E. Evagr. 1. 2. c. 4. p. 238.) and obliged them all to sign it. After which it was filled up with the charge of heresy against Flavianus, and the sentence of his deposition. Flavianus still excepting against the president, he and others fell furiously upon him, beating him barbarously, throwing him down, kicking and trampling upon him, insomuch that three days after he died of the bruises he had received in the council. Liberat. Breviar. c. 12. Niceph. Callist. 1. 14. c. 47. tom. 2. p. 550. edit. Paris 1630.

The general council of Chalcedon, I say, was called upon occasion of the transactions and decisions of this council of Ephesus; and after some struggle between the two contending parties, for and against Dioscorus; some crying out

partial, disinterested enquirers, like himself, than to adopt the resolutions of the most venerable synod, in which truth and right are decided by the major vote. I would not be thought to be an advocate for an arrogant, insolent, pragmatical contempt of the opinions of others; what I mean is, that were I to be under

out for the condemnation and banishment of the heretic, for Christ had deposed him; and others, for his restorations to the council, to the churches; (Concil. tom. 2. p. 310. B.) the party against him prevailed, and he was deposed, (tom. 2. p. 377.) and the doctrine of the two natures, which had been condemned before, was now affirmed; the fathers crying out, "We believe as " Pope Leo doth, anathema to the dividers and confounders, we believe as " Cyril did; thus the orthodox believe, cursed be every one who doth not be- " lieve so too". Concil. tom. 2 p 305. E.

On this brief survey of these four general councils, will the reader believe, that they are by law joined with the scriptures, as judges of heresy, and as guides of that "*public judgment* which hath a better chance to be right than " the singular notions, or private judgment of any particular man?" Yet so it is. See 1 Eliz. c. 1. sect. 36.

It may, perhaps, by some persons, be esteemed an act of prudence to conceal the enormities of such famous assemblies of Christian bishops, lest the honour of Christianity should suffer by exposing them. But, I confess, I cannot be of this opinion. Christianity can never suffer, in the judgment of any impartial person, by the conduct of those turbulent and factious men, who have figured on the public theatre in support of *political religion*; while it hath numberless advocates in every age, who, by their example as well as influence, promote the interest of *personal religion*; exhibiting the fairest patterns of meekness, humility, contempt of the world, patience, contentment, purity, and spirituality, universal benevolence and charity, as well as the most undismayed and fervent piety. Such men of sterling worth, such genuine Christians, who pass through the world, like a gentle current, which fertilizes the whole adjacent country, appear with no eclat in history; the good effects of their virtues being diffused in silence; while the restless and ambitious, who aim at wealth and power and pre-eminence, and bear down all before them, like restless torrents, which desolate whole regions, attract observation for the changes they produce in the world, and the materials they furnish for the pen of the civil or ecclesiastical historians. Nevertheless, those good and righteous men, who have served their generation in their particular stations, by their private virtues, will be hereafter had in everlasting remembrance; when those who have stood forth to the public as the champions of tyranny or secular Christianity, will be covered with shame and everlasting contempt.

der direction in the pursuit of truth, I had rather follow (next to the divine blessing on my own sincere enquiries) the judgment and guidance of some wise and good men, than the public decisions of any or all the councils since the days of the apostles.

THE third article which you exhibit against reviling the liturgy, is, that it involves in it “ ingratitudo, by denying indulgence and liberty of conscience to the members of the national church”. There would be little room, surely, Sir, to complain of violations of liberty of conscience; if, in contending for their respective dogmas, men never went beyond contemning and ridiculing one another: for, however censurable this may be, it certainly is not denying them liberty of conscience: that always implies restraint or compulsion, ideas very different from contempt and ridicule†.

BUT perhaps, reviling the liturgy may be censured, as ungrateful, on account of the toleration indulged to Dissenters. It is not, however, to the church the Dissenters are peculiarly indebted for this blessing‡. For though her governors promised

them

† The author in his late edition, vol. iv. p. 50. declares reviling the liturgy to be “ ingratitudo, by denying that indulgence and *undisturbed* liberty of conscience to the members of “ the national church, which the retainers to every petty conventicle enjoy.” So that reviling is not denying absolutely liberty of conscience, but only *undisturbed* liberty of conscience. But do the retainers to every petty conventicle enjoy this liberty *undisturbed* in his own sense of the word? I appeal to the learned gentleman himself, whether this assertion would have appeared with less grace, if that scornful expression concerning Dissenters, “ retainers to every petty conventicle,” had been suppressed; since it not only *disturbs*, according to his own idea of the word, but by implication, *denies* their liberty of conscience; conventicles being, as I said before, *unlawful assemblies*.

‡ The author of the Alliance between the Church and State, in his Postscript and answer to lord Bolingbroke, p. 2, 3. speaking both of the test-act and of the toleration, observes, that “ this reform of the English constitution happened not to be the good work of the church, begun in the conviction of truth, and carried on upon the principles of charity; but was rather owing

“ to

them every mark of Christian temper and brotherly affection, when her fears of popery ran high in the reign of James the Second ; yet, as soon as the storm subsided, these promises were in great measure, forgotten. It is to that great prince, King William, to whom the British constitution and liberties owe their preservation and security ; and to those renowned patriots who first engaged, and then supported him, in the glorious enterprise ; it is to these, and such as these, the Dissenters are, under God, alone obliged for their deliverance from unjust violence and oppression ; and for being restored, in part, to their natural rights by the toleration. I say, to their natural rights : for religious liberty is one of those rights to which men are entitled by nature ; as much so, as to their lives and properties : and it should be remembered, therefore, that the Dissenters cannot be justly reckoned to be any more obliged to those who *kindly* do not again deprive them of it ; than they are to those who *as kindly*, do not seize on their estates, or take away their lives : an obligation, which, I suppose, hath never been esteemed a reason for any *peculiar gratitude*.

AND now, Sir, notwithstanding the exceptions which I have taken to your premises, I will leave you in full possession of your conclusion : I will suppose, that the crime of reviling the liturgy is a complication of “ indecency, arrogance, and ingratitude :” and I will add, moreover, that it may possibly imply, (and, I think,

“ to the vigilance of the state, at one time, vainly perhaps, anxious for the established religion, (Char. II.) at another, wisely provident for the support of civil liberty.” (Will. III.) The Author is certainly right with respect to the toleration : it was entirely the work of the state. King William engaged in it heartily : partly, no doubt, to strengthen the interest of civil liberty, of which the Dissenters were to a man zealous friends ; and partly, from a regard to religious liberty, of which he had all his life shewn himself a firm and steady patron. The test was not the work of Charles the IId. it was pushed on in opposition to the court by the patriots of those times, in order to secure the civil as well as the ecclesiastical constitution from the machinations of the Papists, by excluding them from public offices ; and the royal assent to it was procured by the Commons stopping the bill of supply till it was passed.

think, it is the principal thing that can be implied in it, though you have not at all mentioned it,) great malignity and inveteracy against the church. But, surely, to confiscate a man's goods, and imprison him for life, for any degree of any of these evil dispositions towards the church, when discovered only by words, (though it be frequently, and they be ever so open and explicit,) and not by any injurious and dangerous overt-acts; must be considered, one would think, by persons of humanity, and doubtless therefore by you, Sir, upon further reflection, to be somewhat *too severe and intolerant*. Notwithstanding all the bitterness with which the puritans inveighed against the offices of the church, (and which they did not do, till by oppression they were provoked almost to madness,) the passing this act, in my opinion, discovered a very intolerant spirit in those who, at that time, had the conduct of public affairs.

BUT perhaps it may be said, that this measure was adopted only out of prudence, for the security of the national establishment. You inform us, that "the terror of these laws (for you "say, they seldom or never were fully executed) proved a principal means, under Providence, of preserving the purity as "well as decency of our national worship." Which, give me leave to say, Sir, is passing no great compliment upon the national worship.

BUT however that be: what had the church to fear from the revilings of the puritans, that she must fence herself around with human terrors? We are to suppose, she had all the truth and argument, as well as the encouragement of the civil magistrate, on her side. In this case, having recourse to human terrors was bringing disgrace on a good cause, and doing credit to a bad one. For the presumption, in most men's minds, is always in favour of the cause which is oppressed and persecuted; and that this is the case, is owing, partly to a certain generosity in mankind, which inclines them to side with the weakest, and those who

† Comment. vol. iv. p. 51.

who are ill treated ; and partly to a persuasion, which appears not wholly unreasonable, that while argument can be maintained, terror will not be employed. And for my own part, I am persuaded, that the church, instead of insuring its safety by these methods, greatly increased the number of its enemies, and inflamed their animosity and inveteracy. Had the governors of the church or state, at that time, made a few concessions, such as not only the puritans, but many wise and great men in the church, desired; or, in case they had not thought proper to do this, if they had indulged and tolerated those puritans, who could not in conscience conform ; it is my opinion, the church wou'd have been in no more danger from the puritans of that age, than it is now in from the Dissenters of this. Such severe laws occasioned the very crime they were intended to prevent: for the imbibited men's spirits, and inflamed their passions : and when the mind is greatly irritated, it is hardly in human nature to speak with temper and moderation, either of those by whom, or of that for which, men feel themselves ill-treated and opprefsed.

I WOULD further observe, (and it is an observation I would submit to the consideration of a gentleman of your profession, in particular) that, on supposition this act was levelled only, as you seem to imagine, against the bitter reproaches and insults of the puritans, it seems to have been drawn with too great a latitude of expression. I believe you will admit, and, I think, you have somewhere said something like it, that it is the excellence of any law to define offences and punishments with the utmost precision, that the subject may know distinctly what is lawful and what is forbidden. But is this the case with the act before us, supposing it be designed merely against reviling and outraging the offices of the church ? For, what is the precise idea of one who declares or speaks any thing, in open words, in derogation of the common prayer? Surely under an expression of such latitude may be included every man, who openly declares his disapprobation of it, or as the act expressly faith, of any thing

therein contained, or any part thereof; that is, every one who gives any of his reasons for not joining in the offices of the church; and he may, by a willing judge and jury, nay, ought, according to the literal sense of the words, to be convicted upon this statute. Now, supposing this law was intended only, as you seem to think, against insulting and reviling the liturgy; can so good a lawyer as Dr. Blackstone approve of a statute, which is so worded as to comprehend persons who are entirely innocent of the crime intended*?

BUT in truth, I cannot help thinking, that it was the actual intention of those who promoted this act, to put an effectual stop, if possible, to the puritans *arguments* as well as their revilings; and that, on this account, the act was so expressed, as to include every man who finds fault with the common prayer, though only in a way of argument. For certainly, that is, "in open words speaking in derogation of it." The intent of the act at that time, I am afraid, was, to prevent the questioning any part of the service of the church, either in a way of reasoning or reviling.

BEFORE

* Having met with one or two persons who conceive what is here said not easily reconcileable with what I before advanced in p. 32. I beg leave to observe, that in p. 32. I speak of it as a *felicity*, that our laws against heresy have not precisely defined it, because in *these times of lenity and moderation*, it is not very likely that a jury will take upon them to define it, where the law hath left it *doubtful and undefined*, and them at *liberty* to put a favourable construction. But the sentiment I here suggest is, that if the judgment of the learned Commentator concerning the crime against which 1 Eliz. c. 2. §. 14. is levelled, be right, then there is a want of precision of *another* kind, not arising from the *uncertainty* of the expression, but from the *latitude* of it, which *comprehends*, and thereby *binds down* the jury (without leaving any room for the interposition of their lenity) to convict, persons who, in his opinion, are innocent; and therefore he ought to have condemned this law for the *impropriety* as well as severity of it; whereas in the former case, the *impropriety* might have been *excused* for the sake of the good consequence arising from it through the lenity of the times. What I have said in these two passages being thus brought into one point of view, I apprehend there will not appear to be the least inconsistency between them.

BEFORE Dr. Blackstone, therefore, had declared his approbation of this statute, and much more of the continuance of it to the present time, he should have considered, what persons and what cases, according to its literal and just construction, and perhaps according to its original intention, may be affected by it; and whether he would chuse to vindicate it in its full extent. In every view it appears to me very surprising, that you, Sir, who have expressed yourself, on various occasions, with so much liberality of sentiment, should think " the continuance of this " act not too severe and intolerant."

AFTER such a declaration, I cannot be much surprised at your passing this encomium on the reign of Elizabeth, notwithstanding it produced such severe laws against nonconformity, that " the reformation was then finally established with tem-
" per and decency, unfullied with party-rancour, or personal
" caprice and resentment*." An impartial review of the ecclesiastical history of those times, as it is exhibited by Fuller, Strype, and other credible historians of the church of England; is, I think, sufficient to convince us, that there was, in that reign, a great deal of ill-temper, party-rancour, and personal pique and resentment in the governors of the church, which entered much more than it should have done into their deliberations and conduct concerning ecclesiastical affairs. The queen, it is true, at the entrance of her reign, discovered great policy and caution, in the measures she employed to take down the fabrick of Popery, which her sister queen Mary had re-edified. Nevertheless, through the whole course of it, there were few demonstrations of temper and moderation in her, or in those governors of the church whom she principally esteemed and preferred; whereas there were many proofs and examples of unjust and cruel severity, towards those Protestants who disliked the least article in her ecclesiastical settlement, or who expressed,

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* Comment. vol. iv. p. 49.

though in ever so humble and modest a manner, their desire of a further reformation. The truth is, she had entertained such lofty conceptions of her spiritual as well as temporal prerogative, and was disposed to maintain it, upon all occasions, with such rigour; as cannot be easily reconciled with any just notions of religious liberty, or with any regard to the sacred and inviolable rights of conscience.

I am,

Sir, &c.

P O S T S C R I P T

T O

L E T T E R IV.

SIR,

I SHALL not be thought deficient, I hope, in that amiable virtue, candour, of which you have set a laudable example; if I observe, that some of the alterations in the late edition of your Commentaries, are not perfectly satisfactory. In particular, the account in this edition, as well as that in the former, of the clause in the act of uniformity, 1 Eliz. c. 2. §. 9. against declaring or speaking any thing in open words, in derogation or depraving of the liturgy, appears to me to be liable to several objections, "The continuance of this clause," you say, "to this time, in terrorem at least," (thus you now chuse to express yourself) "cannot be thought too severe or intolerant; when we consider, that it is levelled at the offence, not of thinking differently from the national church, but of railing at that church and its ordinances, for not submitting its public judgment to the private opinion of others. For though it is clear," you add, "that no restraint should be laid upon rational and dispassionate enquiries into the rectitude and propriety of the established mode of worship, yet contumely and contempt are what no establishment can tolerate." And then you remark, that "a rigid attachment to trifles, and an intemperate zeal for reforming them, are equally ridiculous and absurd. But the latter is at present the less excusable, because from political reasons sufficiently hinted at in a former volume, it would now be extremely unadvisable to make any alterations in the service of the church." And in support of this observation, that "contumely and contempt are what no establishment can tolerate,"

" tolerate," you insert this marginal note: " By an ordinance*, " 23 Aug. 1645, which continued till the restoration, to preach, " write, or print any thing in derogation or depraving of the " directory for the then established presbyterian worship, sub- " jected the offender, upon indictment, to a discretionary fine, " not exceeding fifty pounds. (Scobel, 98.)"

THE first remark, which I think proper to make, relates to the approbation here given to acts in *terrorem*: to acts which are attended (like that in particular now under consideration) with penalties too severe to be executed, consistently with any principles of humanity, or even equity; which requires a due proportion between the punishment and the crime. And such laws cannot, I think, be considered as the offspring of political wisdom, so much as of an arbitrary and tyrannical disposition: for the laws of a wise state should only be such, if I am not mistaken, as may be carried into effect, with reason and justice. The common law of England, in particular, is the voice of reason; and its statutes should always speak the same language.

IT is not sufficient to allege, that these laws are made only in *terrorem*: an allegation, I say, which can never vindicate them; for this obvious reason, because they never contain in them a declaration, that they are made only in *terrorem*; indeed if they did, they would absolutely defeat their own intention. That such laws are not executed therefore, and that acts of severity and cruelty are not in consequence of them, and under their sanction, committed, is not at all owing to the laws themselves, but

* The words of the ordinance are, That what person soever shall with intent to bring the said directory into contempt and neglect, or to raise opposition against it, preach, write, print, or cause to be written or printed, any thing in the derogation or depraving of the said book, or any thing therein contained, or any part thereof, shall lose and forfeit for every such offence, such a sum of money as shall at the time of his conviction be thought fit to be imposed upon him by those before whom he shall have his tryal, provided that it be not less than five pounds, nor exceeding the sum of fifty pounds.

but solely to the spirit of the times. And the laws themselves are neither better nor worse, because they do not happen to be executed. To form therefore a right judgment concerning them, we should examine them as to what they are in their own nature, and on supposition they will be executed; and approve or condemn them, as they appear in this view, to be either reasonable or otherwise. Suppose a prosecution is commenced, that the law hath its course, and that the penalty is inflicted, the proper question is, What shall we think of the law in these circumstances? And in the case before us, where the penalty is one hundred marks for the first offence, four hundred for the second, and forfeiture of goods and chattels and imprisonment for life for the third offence, of speaking in open words in derogation of the common prayer; I believe, on supposition of the actual infliction of this penalty, especially in the last instance, I may safely appeal to the most zealous partisan of the established liturgy, whether there is any proportion between the punishment and the crime.

BESIDES, the subject should always be able to learn his condition under any law, from the law itself; and not be obliged to recur, for this purpose, to considerations wholly foreign to it; such as the spirit of the times, and the chance that it will not be executed. This is not being under the government of law, under a known and equitable rule; it is being at mercy; it is being subject to fortuitous events, of which no estimate can be taken. Now every law is unreasonable, which leaves the subject in a condition so insecure: Every law deserves to be condemned, which brings the infliction of an unreasonable and disproportionate punishment, within the power of every one who takes upon him to be an informer or prosecutor; and which affords, therefore, no security from injustice and oppression (for every penalty more severe than the offence deserves, is, in proportion, unjust, and oppressive); I say, every such law should be exploded, as leaves no ground of exemption from injustice and oppression, but the bare presumption that

that there will be no prosecutor, and consequently that the law will not be executed: which really amounts to this very bad compliment upon the law, that the people will discern the iniquity of it, and have more wisdom and moderation than those who enacted it. However, it must be confessed, this is not always to be expected; and therefore (to use your own fervent expressions concerning the laws in *terrorem* against the *PAPISTS*)

“ it ought not to be left in the breast of every merciless bigot to
 “ drag down the vengeance of those occasional laws upon inoff-
 “ fensive, though mistaken, subjects; in opposition to the le-
 “ nient inclinations of the civil magistrate, and to the destruc-
 “ tion of every principle of toleration and religious liberty*.”

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* Comment. vol. iv. book 4. chap. 4. page 57. Penal laws are never warrantable against any mere system of religion: and yet they may be justified against the system of the church of Rome, because it is not merely a corrupt and erroneous system of religion, but a wicked conspiracy for the extirpation of all who oppose her enormous superstitions and usurpations: and hath uniformly appeared to be so, wherever her power hath been predominant. Upon this conviction, very severe statutes have been enacted against the papists, in these Kingdoms, at those particular periods since the reformation, when peculiar danger was apprehended from their machinations. These laws are nevertheless every day violated with impunity. And the reason is, that they have seldom or never been executed; because they are of so severe and sanguinary a nature, that the idea of executing them, shocks the humane and liberal sentiments of the age. It is, notwithstanding, always requisite to be on our guard against the prevalence of Popery, that implacable enemy to the general liberties of mankind, as well as in particular to our own happy constitution. But the danger, I apprehend, would be more effectually prevented by laws which might be properly executed, than by laws which the genius and spirit of the times have rendered as dormant as if they were obsolete. The system of laws established in Holland would perhaps deserve consideration. That wise people, I am informed, permit no Jesuits at all in their country, and no priests but natives; no money to be carried out of their dominions upon a religious account, no attempts to make prosyltes, and the like. And in case of a breach of any one of these regulations, the place of worship belonging to the Roman Catholics, (for under the preceding restrictions, they are tolerated in Holland) in the district where the offence is committed, is immediately shut up. This makes it to be

I F any one plead the danger arising from impunity, as an excuse for the severity of that law in particular, which we have now in contemplation ; I profess, I cannot perceive, as I observed in my fourth letter, any such mighty danger arising from mere words spoken in derogation of the common prayer, separate from any violent and outrageous overt acts, as will be a tolerable excuse for penalties so enormously severe*.

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be the interest of their religion, for every individual to observe the laws of his country ; and the consequence is, that there is hardly ever a convert attempted to be made to Popery ; and the Catholics, the descendants of popish ancestors, or those who come to settle in the provinces, are preserved, or weaned, from any attachment to a foreign interest ; and at the same time, having no share in the magistracy, and their numbers and persons being well known, the danger which might be apprehended from their principles, is in great measure precluded : perhaps in a greater degree, than where the laws are so severe, that, except in case of overt acts of treason or rebellion, they can never be executed.

I have made these observations, because I apprehend, laws in terrorem will in any case answer very little purpose. I am however persuaded, that to guard against the prevalence of Popery, by every method which appears to be calculated for that end ; in Protestants, whom Papists stile heretics, and as such esteem fit for nothing but extirpation in this world, and damnation in the next, is mere self-defence. And, thanks to the Catholics, whilst they have among them such writers as the author of the life of Cardinal Pole, who in this protestant kingdom has the audacity to write a cool apology for the flames which were kindled in Smithfield by queen Mary, they will not let us overlook the necessity of taking every measure requisite for our security, against their pernicious and persecuting principles and practices.

* It is very extraordinary, that this act inflicts the same penalty upon open words spoken in derogation of the common prayer, as upon the overt act of obstructing the reading of it. It enacts, " That if any person whatsoever shall in any open words, declare or speak any thing in the derogation of the common prayer; or by open fact, deed, or by open threatenings, shall unlawfully interrupt or let any parson, vicar, &c. to sing or say common and open prayer, or to minister the sacraments, in such manner and form as is mentioned in the said book; he shall for the first offence forfeit one hundred marks, for the second four hundred, for the third all his goods and chattels, and suffer imprisonment for life." 1 Eliz. c. 2. §. 9, 10, 11. Is the offence of speaking against the common prayer, of the same magnitude with obstructing the reading of it, perhaps by violence ? If not, where is the wisdom and justice of making the penalty, in these two very different cases, the same?

You endeavour, however, to support your opinion, that "the continuance of this act to the present time, in terrorem at least, is not too severe and intolerant," by suggesting, that it is levelled at the offence, not of thinking differently from the national church, but of railing at that church and its ordinances for not submitting its public judgment to the private opinion of others." I readily admit, that the act is not levelled against thinking differently from the national church: it would be a gross absurdity, if it were; inasmuch as mere thought can never come under the cognizance of any human law whatsoever. But there is surely a medium, in all cases, between thinking and railing; I mean asserting and arguing: and therefore supposing (but not granting) this act to be intended merely against railing, I think, with submission, you should have attempted, at least, to define the crime more accurately than you have done; that under the notion of railing, a man's merely declaring his sentiments, and arguing in support of them, may not be construed to be within the intent of this act. Any one who considers the usual course of religious controversy may observe, that what presses close upon an adversary, what cannot be easily answered, is very apt to be exclaimed against as misrepresentation and abuse; and the disputant, who only reasons, if he sets his argument in a light calculated to convince or confound his adversary, is presently charged with railing. Nothing is bestowed more indiscriminately, than such language; for bigots of all parties, who see no difficulty on their own side, take it for granted, when they cannot get rid of an untoward consequence charged upon them and their principles, that the fault is neither in the cause which they espouse, nor in their management of it; and therefore they cry out upon foul play in their antagonists, upon their misrepresenting and reviling what perhaps they only exhibit in a right point of view. To draw the line between reasoning and reviling, in every case, is indeed no easy matter; and I must beg your excuse, Sir, if I presume to say, that I believe you found it so, by the lax and uncertain state in which you have

have left this question; opposing only the two extremes of thinking and railing to each other, and leaving it in doubt in what class, whether of things allowed, or of things prohibited, is to be ranked reasoning in support of direct positions and plain declarations. But was it right to leave a point of this consequence wholly doubtful and undetermined? Because, in particular cases, it may be difficult to mark the difference between asserting and reasoning on the one hand, and railing or reviling on the other, was it right, that no exception should be made in favour of a man's declaring his sentiments, and supporting them in the best manner he is able in the way of reasoning and argument?

You admit it, I own, to be clear, "that no restraint should be laid upon rational and dispassionate enquiries into the rectitude and propriety of the established mode of worship." In what degree *enquiries* concerning the propriety of the established mode of worship may come within the intendment of the act, or whether they do at all, I will not pretend to determine. Enquiring, in the proper import of the term, may not perhaps amount to *declaring* or speaking any thing in open words in derogation of, that is, advancing a plain position against, the liturgy, or any part of it. But then, I apprehend, the question is not so much concerning mere enquiries, as concerning direct positions and arguing in support of them*; the act, as I before ob-

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served,

* A learned bishop observes, that "it is something odd, to have two creeds" (the Nicene and Athanasian) "established in the same church, in one of which those are declared accursed, who deny the Son to be of the same ousia, or hypostasis, with the Father;" ex eteras upostaseos e ousias phaskontas einai — toutous anathematizei e katholike kai apostolike Ekklesia. Symb. Nicen. vid. Socrat. Hist. Eccl. l. 1. c. 8.) "and in the other it is declared, they cannot be saved, but perish everlasting, who do not assert, that there is one hypostasis of the Father, and another of the Son." See the late bishop of Clogher's Essay on Spirit, p. 146. edit. 2. I should be glad to know under what head this *direct charge* is to be arranged; whether it amounts to *declaring* any thing in derogation of the liturgy? and consequently, whether it comes within the intendment of the act?

served, being plainly levelled against allowing those who dislike the liturgy, or scruple the use of it, to assert and defend the grounds of their opinion and practice; and that even when attacked by others. So that whatsoever be the case concerning mere rational and dispassionate enquiries into the propriety of the established mode of worship, I presume it is very plain, from the express words of the statute, that every positive assertion or *declaration* of a person's sentiments concerning the impropriety of that mode in any one respect (the act referring not only to the book in general, but to "every part of it, and every thing therein contained") comes within the meaning of "speaking in open words in derogation of the common prayer." And this observation, if it be just, as I think it is, supersedes all occasion of distinguishing between asserting and reasoning on the one hand, and railing or reviling on the other; because it shews, that the act alike comprehends and condemns both of them. And therefore, Sir, unless you intend to prohibit every such assertion or declaration of opinion concerning the impropriety of any part of the established mode of worship, though supported by the most substantial reasons, I hope you will, as with submission I think you should, retract your approbation of these severe clauses in the act of uniformity.

IF any rail at the church and its ordinances, I am not the advocate of such persons. Railing is always unwarrantable, and never serviceable. And yet I suppose, if it hath ever been employed against the common prayer, it hath seldom been for the reason you assign, that the church "will not submit her public judgment to the private opinion of others." I rather think, in such cases, it is generally owing to an imagination at least, that the object of ridicule is really contemptible; and that the public judgment is not so very sacred, as to sanctify every thing which hath the sanction of public authority. Whether this apprehension be sufficient to justify such conduct, is a different consideration.

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You endeavour, I perceive, to support your approbation of this act, by remarking, that "contumely and contempt are "what no establishment can tolerate;" and in confirmation of this, you have inserted this note in the margin, that, "by an "ordinance 23 Aug. 1645, preaching, writing, or printing any "thing in derogation or depraving of the directory for the then "established presbyterian worship, subjected the offender upon "indictment to a discretionary fine, not less than five, and not "exceeding fifty pounds." I am sorry, Sir, you should pay so great a compliment to this ordinance (so much beyond what I think it deserves) as to produce it in defence of this favourite act of Elizabeth. It is so far from being, in my humble opinion, an authority sufficient to give countenance to a thing disputable or exceptionable, that the framers of it were very culpable in following the bad example set them by that act. And yet it should in justice be observed, that even in this instance of retaliation (which, I admit, cannot be justified) they assigned a far more moderate penalty than was before done; a fine not less than five, yet never exceeding fifty pounds, being much below one hundred marks for the first offence, four hundred for the second, and forfeiture of goods and chattels and imprisonment for life for the third. And this they laid, not as in the case before them, upon "declaring or speaking any thing in open "words," but only upon "preaching, writing, or printing, "in derogation or depraving of the directory, with intent to "bring it into contempt or neglect, or to raise opposition against "it."

But notwithstanding, Sir, the favourable light in which you have placed this ordinance, I cannot prevail upon myself to approve it. For sure I am, whatever religious institutions cannot be supported, without the aid of such penal statutes or ordinances to secure them from contempt and ridicule, had better not be supported at all. If reason and argument are on their side, contempt and ridicule in the end, will do them no real

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prejudice ; and provided reason and argument are not on their side, it is no matter how soon they are discarded. By this, Sir, you may perceive, that I have no better opinion of penal laws in support of a Presbyterian, than of an Episcopal establishment, The Presbyterians, I confess, formerly copied too nearly the example of the Episcopalian. The genuine principles of universal and impartial liberty were very little understood by any ; and all parties were too much involved in the guilt of intolerance and persecution. The Dissenters in our times freely acknowledge this, and condemn the narrow principles of many of their predecessors ; having no objection to transmitting down to posterity, in their true colours, the acts of oppression and intolerance of which all sects have been guilty ; not indeed, as is sometimes done, with a view of encouraging such conduct in one party by the example of others ; but of exposing it alike in all, and preventing it wholly, if possible, in time to come.

THE observation, which you make at the close : namely, that “ a rigid attachment to trifles, and an intemperate zeal for “ reforming them, are equally ridiculous and absurd ;” would, I admit, be very just, and quite applicable to the present case, provided only the things in question were merely trifles. But that is gratis dictum ; and, I believe, you will allow, that in matters of this nature, the most venerable ipse dixit deserves no regard : and that even your authority, Sir, respectable as it is, cannot claim the privilege of being substituted in the room of reason and evidence.

WITH submission, Sir, the power of decreeing rites and ceremonies, and authority in controversies of faith, claimed by the church ; the authoritative absolution of sin, in the visitation of the sick* ; the expressions of strong hopes of the happiness of some

* The rubrick orders, “ that the sick person shall be moved to make a special confession of his sins, if he feel his conscience troubled with any weighty matter. After which confession the priest shall absolve him, (if he humbly and heartily desire it) after this sort :

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some perhaps of the worst of men, in the burial of the dead; and the pronouncing damnation, in the creed ascribed to Athanasius; certain, inevitable and everlasting damnation, upon every one that doth not believe the whole of it*; and in general

“ Our Lord Jesus Christ who hath left *power to his church* to absolve all sinners who truly repent and believe in him, of his great mercy forgive thee thine offences: And by his authority *committed to me*, I absolve thee from all thy sins, in the name of the Father, and of the Son, and of the Holy Ghost, Amen.”

And how this authority *is committed* to the priest, may be seen in the office of ordination, where the *biſhop*, putting his hand on the head of the person to be ordained, saith, “ Receive the Holy Ghost——Whose sins **THOU** dost forgive they are forgiven; and whose sins **THOU** dost retain, they are retained; in the name of the Father, of the Son, and of the Holy Ghost. Amen.”

There is something similar in the office of confirmation, where the *bishop* lays his hand on each individual, “ *to certify him by this sign*” (as the collect expresses it) “ of God’s favour and gracious goodness towards him.” Though the twenty-fifth article, by the way, affirms, that “ confirmation hath not any visible *sign* or ceremony ordained of God”.

If those expressions and actions are understood according to their obvious import, and as I fear they are often understood, as in the one case conveying, and in the other exercising extraordinary powers; they mean *too much*. If they are understood, as they are sometimes explained, or explained away rather; they are in danger of being considered as nothing better than *solemn trifling*, as “ grasping at the shadow of an authority” (to use the words of the late Dr. Stebbing in his instructions of a parish minister to his parishioners on the subject of popery, part 2. p. 37, 38) “ which we must all renounce. What else do we, when we pretend to absolve conscience? We may use an hundred distinctions, if we please: we may say, that the absolution is not authoritative, but declaratory; or, that it is not judicial, but ministerial: but if you would speak to be understood, you must say, that with respect to any real internal effect it is **NOTHING**; and you will speak *truth* too: for all the rest, if you will preserve to God his *prerogative* to forgive sin, are words without meaning.” I only add, that it would be more manly, rational, christian, to alter such passages, than to attempt to explain them: which, I apprehend, it is impossible to do, in a way consistent with reason and scripture.

* It is observable, that with respect to those concerning whom the Athanasian creed declares, that they shall **WITHOUT DOUBT** perish *everlastingly*; the burial

ral, the imposing such unscriptural forms to be used in the public service, and such doctrinal articles to be subscribed, as many wise and good men in the church can with difficulty, if at all reconcile to their real sentiments: these and several other particulars which might be mentioned, with all due deference to your judgment, Sir, are no trifles. And though I am not disposed to cast unjust or severe reflections upon any of the public forms, I really cannot help hinting upon a proper occasion (with all due respect to the statute) how things appear to me; how indeed they have appeared to others, not to Dissenters only, but to many who have been the glory of the Established Church; and have, nevertheless, wished for alterations in these and many other particulars; such alterations, as you, Sir, esteem very improper to be attempted; because, you say by the act of union between England and Scotland, the constitution and worship of the two churches respectively are rendered immutable: a point, which deserves to be distinctly examined. I am, Sir, &c.

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burial office, appointed to be read over the same persons, if they are not excommunicated, thanks God that he hath in ~~great mercy~~ taken them to himself, and ~~hopes~~ that they rest in Christ.

It is not my design to enter upon the particulars of the controversy between the Church and the Dissenters. They may be seen on the Dissenting side, in all their strength, in the Dissenting Gentleman's (I think, unanswerable) Letters to Mr. White. I only observe, that if the power and authority, claimed in the twentieth article, of decreeing rites and ceremonies and deciding controversies of faith, be once proved, the debate will be brought to a short issue: but till then, the ground of dissent will remain firm; since there can be no obligation upon us, in point of conscience, to comply with any rite or ceremony, or any decision of faith, which we do not ourselves perceive to be divinely appointed; and that, whether it be of greater or less importance: nay, it is rather our duty to oppose the *imposition* of all such rites or such articles, out of regard to the sovereign authority of Christ; which, in such cases, is the sole ground of obligation upon Christians.

L E T T E R V.

SIR,

THE attempts to procure a further reformation in the church have been many and various. But while I enjoy my liberty as a Christian, and a Protestant Dissenter, I am not solicitous, on my own account, whether any alterations are made in the constitution or liturgy of the church of England. I despair of ever seeing the terms of conformity so enlarged and liberal, as to invite me into the establishment. But when I consider, that there are persons already in the communion, and even in the orders of the church, who desire, and endeavour to obtain, a reformation of various particulars which they, as well as Protestant Dissenters, think ought to be reformed; I am sorry, on their account, and for the interest of religion in general, whenever I see difficulties thrown in the way of a design so laudable, and so desireable. In this view, it is with no small concern, that I observed you laying so much stress on the following sentiment: That " an alteration in the constitution or " liturgy of the church of England, would be an infringement " of the fundamental and essential conditions of the union be- " tween England and Scotland, and would greatly endanger " that union*."

I WILL first make some remarks upon this question, according to your state of it; and then explain the particular view in which, I think, it ought to be considered.

I OBSERVE that you allow, that, notwithstanding the act of union, and the conditions therein enacted, there is a competent authority in the British parliament for making such alterations

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* Comment. vol. i. p. 98.

in the church*. And if so, whether the parliament should venture to exercise that power, is merely a question of prudence and expedience. You declare your opinion that, " it will endanger the union." With submission, I cannot conceive, there could be any great danger in a parliamentary review and alteration of such things, as it would be agreeable to the members of the church of England themselves should be altered; and especially if it be apparent to the whole world, that the design takes its rise in the church of England itself. The Scots would then have no reason to be alarmed; and I hardly think they would be so; because the case here supposed, is no precedent for any alterations in their church, except what they themselves shall desire. Could we suppose, indeed, an attempt made of alterations in the church of England, at a time when the Scots had reason to apprehend a design, formed in England, to make alterations in the church of Scotland; and that alterations here were only made to furnish a kind of precedent for carrying that design into execution; they might, and probably would, be alarmed. But I cannot see, for my part, any dangerous consequences in the parliament's making what are generally considered to be real improvements (even tho' it should not be thought absolutely necessary to make them†) in either church, provided it

* " It may be justly doubted," saith the learned Commentator, " whether such an infringement of the act of union (though a manifest breach of good faith, unless done upon the most pressing necessity) would consequently dissolve the union: for the bare idea of a state without a power somewhere vested to alter every part of its laws, is the height of political absurdity." Comment. vol. i. p. 97. 98. note. And in the Reply to Dr. Priestley, p. 44. speaking of the *power* of alteration, he saith " it must necessarily reside in the supreme legislature of the united kingdoms." Again, p. 46. " Indeed I have allowed, that the *power* of new-modelling the churches both of England and Scotland (however dangerous its exertion might be) still resides in the parliament of Great-Britain."

† See Comment. vol. iv. p. 51. where the author saith, " it would now" (since the union) " be extremely unadvisable to make any alterations in the service of the church; unless it could be shewn, that some manifest impiety or shocking absurdity would follow from continuing it in its present form."

it be done only in conformity with the general sentiments and desire of the respective churches themselves. We see, in fact, that the passing the patronage act, in respect to the church of Scotland, was attended with no such formidable consequences as you seem to apprehend; though it was an infringement of the union, the more dangerous, because that act was passed under the influence of Queen Ann's last ministry, in opposition to the general sentiments of the Scottish nation.

IN what I have said, I have left all consideration of the intention of the act of security of the church of England, included in the act of union between the two nations, entirely out of the question. But after all, permit me to ask, Whether it was not the spirit and design of these acts of security in both churches to prevent the incroachments of one upon the other, after the union took effect? It must certainly be admitted, that an apprehension of such incroachments upon each other, was the *occasion* of those acts; for if it had not been for the dangers apprehended by each church from the other, those acts of security of the two churches had never been passed at all: and from the *occasion* we may infer the *design*.

BESIDES, if no alteration must be made in either of the two churches, because the act of union hath settled things immutably in each: then the act of union amounts to a declaration of the legislature, that they would, and their posterity should, always think and act exactly as they did at that time: which, as Dr. Priestley observes, in his letter to you, published in the St. James's Chronicle of October 10, 1769, is to absurd, that one would not willingly impute it to two such august assemblies as the parliaments of both kingdoms.

BUT there is another view in which this point may be considered, independently of any enquiry, what was the design of the two parliaments, or the two nations, at the time when the act of union was enacted; and which, I think is the true one: and it is this:

I BELIEVE it will be admitted, that in all *paclla conventa*, or union treaties, those conditions which are previously insisted upon by either of the contracting parties in its own favour, and in which the interest of the others is not involved; though they are ratified in ever so solemn a manner, are nevertheless alterable, with the free consent of that party who is alone interested therein. This is perfectly consonant to reason, and to the nature of such solemn pactions. Indeed, no conditions can be made so unalterable, that they cannot be reversed in the case which is here supposed; that is, where the only party interested in the condition, and who insisted upon it for his own behoof, releases the obligation, and consents to have it altered. And if this principle be allowed, the propriety of the application of it to the present case will appear, if we consider, that the union between England and Scotland, though an incorporating union in many, was not so in all respects; and particularly that in their ecclesiastical capacities, or with regard to their respective churches, the two nations, who were the original contracting parties; still continue separate bodies: I say, the two nations were the original contracting parties; for this should be carefully observed, that, strictly speaking, the two parliaments were not the contracting parties, but the two nations; for whom, and on whose behoof, the parliaments were only agents, or plenipotentiaries, executing an express or implied trust. And if so, either of the two churches, or nations, may authorize an alteration of any condition stipulated merely in its own favour, and in which the other hath no interest; that is, the English or the Scottish nation or church, may recede from the condition demanded and enacted in its own favour, even though most solemnly declared to be immutable. And on this footing, I mean on the free consent of the party interested therein, the parliament of Great-Britain may make the alterations in question.

INDEED, you tell us, that " without dissolving the union, " you do not see how the sense of either nation could now be
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“separately taken;” (that is) “how the Scots Peers or Commissioners could be prevented from voting either for or against the repeal of the acts of uniformity, in case it were moved in either house.” And I admit, that as the two parliaments are now sunk into the one parliament of Great Britain, the sense of the two nations cannot be separately taken in parliament. But if the sense of the two churches, or nations, in their separate ecclesiastical capacity, may be known, that will be a sufficient foundation for the parliament to proceed upon. For instance, if any alterations were requested of the parliament by the generality of either of the two churches or nations; or, if, upon a motion in parliament for such alterations, and such motion being sufficiently known, they were not in a reasonable time petitioned against by any considerable number, the parliament might presume a general consent, and must form their judgment of this from the notoriety of the fact.

AND this is the footing upon which, I think, the case should be put; and not merely upon a competent authority in the British parliament to make alterations in the two churches. And I am of this opinion, because the parliament of Great-Britain is to be considered as *guardian*, or in *trust*, for both churches; and therefore cannot have any *authority*, that is, *right*, inherent in itself (for *nemo potest, quod non jure potest*) to dispense with the conditions of the union, which were previously declared to be unalterable, *in those particular respects in which the two nations still continue separate bodies*; here, I think, nothing but the consent, expressed or implied, of each of these bodies, as to the condition stipulated in its own favour, can be sufficient warrant for an alteration†.

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† Reply to Dr. Priestley, p. 43.

‡ The learned Commentator observes (Comment. vol. i. p. 98. note) that “such an incorporate union” as that between England and Scotland, “is well distinguished by a very learned prelate from a *federate alliance*, where such an infringement” of it, as making alterations in either of the churches, “would certainly rescind the compact.” Now it happens, that England and Scotland,

LET this be illustrated by the case of the Dissidents in Poland: Can it be thought, that there was an authority in the Polish diet to vacate the solemn *pacta conventa*, and the rights and privileges of the Dissidents grounded upon them? I apprehend, the Dissidents disallow, and protest against, such right or authority in the diet; and, I think, with reason; but they would have no such reason to complain of any infraction of the original settlement, if no alterations had been made but at their own request, or with their own free consent.

ON the whole, this state of the question appears to me to be the only one that is consistent with the general nature of government as a trust*, with the sacred regard due to such *pacta conventa*,

Scotland, in their ecclesiastical capacities, are not incorporated, but only in a *federate alliance*; and therefore, by his own argument, the parliament can have no right to make alterations in either of the two churches, *without its consent*; since the compact would be thereby rescinded: but with such consent, it certainly may; *volenti non fit injuria*.

* The learned author observes, that “ the bare idea of a state without a power somewhere vested to alter every part of its laws, is the height of political absurdity.” (Comment. vol. i. p. 97, 98. note. A position, which I apprehend, ought to be, in some measure, explained and limited. For, if it refers to those particular regulations, which take place in consequence of immemorial custom, or are enacted by positive statute, and at the same time are subordinate to the fundamental constitution, from which the legislature itself derives its authority; it is admitted to be within the power or trust vested in the legislature to alter these pro re nata, as the good of the society may require. But this power, or authority of the legislature to make alterations cannot be supposed to extend to the infringement of those essential rights and privileges, which are reserved to the members of a free state at large, as their undoubted birthright and unalienable property. I say, in every free state there are some liberties and privileges, which the society have not given out of their own hands to their governors, not even to the legislature: and to suppose the contrary (if I may be allowed the expression) would be the height of political absurdity; for it is saying, that a state is free and not free at the same time; or, which is the same thing, that its members are possessed of liberties, of all which they may

convenia, as the act of union, and with the rights thereby reserved to each of the two churches; and, on those accounts, to be much preferable to acknowledging on the one hand, a power in the parliament to dispense with such solemn conditions, when, and as far as, *they* shall think there is sufficient ground for it; or to holding, on the other hand, such conditions to be unalterable, whatever change of circumstances may render an alteration, in the general opinion, expedient and necessary.

In short, this argument, drawn from the immutability of the church in consequence of the act of union, between the two nations, seems to me to be an useful engine to be played off by those who are averse to any alterations; but I believe, (I speak only

may be divested at the will of the legislature; that is, they enjoy them during pleasure, but can claim no property in them.

In a word, nothing is more certain than that government, in the general nature of it, is a trust in behalf of the people. And there cannot be a maxim, in my opinion, more ill grounded, than that there must be an *arbitrary* power lodged somewhere in every government. If this were true, the different kinds of government in the world would be more alike, and on a level, than they are generally supposed to be. In our own government in particular, though no one thinks with more respect of the powers which the constitution hath vested in every branch of the legislature; yet I must be excused in saying, what is strictly true, that the whole legislature is so far from having an *absolute power*, that it hath not *any power* in several cases that might be mentioned. For instance, their authority does not extend to making the House of Commons perpetual, or giving that House a power to fill up their own vacancies; the House of Commons being the representatives of all the Commons of England, and in that capacity only a branch of the legislature; and if they concur in destroying the foundation on which they themselves stand; if they annihilate the rights of their constituents, and claim a share in the legislature upon any other footing, than that upon which the constitution hath given it to them; they subvert the very trust under which alone they act, and thereby forfeit all their authority. In short, they cannot dispense with any of those essential rights of the people, respecting their liberties, properties, or lives, the preservation of which ought to be the great object of government in general, as it is of our constitution in particular. See an excellent passage to this purpose in Dr. Hutcheson's System of Moral Philosophy, book 3. chap. 7. vol. 2. p. 267. at the beginning.

only in general,) would not have much stress laid upon it by those who are inclined to them.

HOWEVER, if it be so, that the act of union renders every tittle and iota of the church constitution and liturgy immutable; this consideration furnishes the strongest argument for *their* separating entirely from the church, who are dissatisfied with the present state of things in it; inasmuch as this invariable settlement precludes all hope of future amendment.

IN your answer to Dr. Priestley you say, you "have neither "leisure, inclination, nor ability to dip yourself in theological "controversy*." Will you suffer me to remind you, Sir, that, if this be the case, you should not have *decided* a theological controversy, on which volumes have been written, in so summary a manner as you have done, when you say, "that many "Dissenters divide from the church upon matters of indifference, or in other words, upon no reason at all†."

To judge of the propriety and truth of this assertion; I first observe, that it is not agreed on both sides, that the things in question are indifferent. And, I think, whoever reads the Dissenting Gentleman's excellent letters to Mr. White, and considers his objections to the present terms of conformity, must at least admit, that a great deal may be advanced to prove, that the things in debate are not indifferent, but such as every judicious, as well as conscientious persons, may reasonably scruple to comply with. However, even supposing them to be indifferent, I observe,

THAT the authority by which they are enjoined, and made necessary to the institutions of Christ, and to a participation of Christian ordinances, may be reasonably called in question. The twentieth article of the church of England asserts, indeed, "that

* Reply to Dr. Priestley, p. 37, 38.

† Comment. vol. iv. p. 52.

“ that the church hath power to decree rites and ceremonies, “ and hath authority in matters of faith.” But this the Dissenters must be allowed to controvert. They assert, that Christ alone hath this authority ; that no power can make that necessary, which he hath not made necessary ; and that what is indifferent in its own *nature*, ought to be left indifferent in *prætice*, and should not be bound upon Christ’s subjects either by civil or ecclesiastical laws; neither of which can, in this case, be of any validity, as being both alike of human origin.

That “ all things should be done decently and in order*,” they admit ; and in the sense of the apostle Paul, they assert with as much zeal as any other persons. But they think, there is a manifest difference between circumstances of natural decency and order, which are necessary to be agreed upon and observed, in order to the performance of any divine worship at all ; and such rites and ceremonies, such additions to divine institutions, as are not at all necessary, in the reason of the thing, or by any law of Christ; but only enjoined by a human, that is, in this case, incompetent authority. “ A power in the church to “ decree rites and ceremonies, and authority in matters of faith”, is a principle so extensive in its influence, that under the shadow of it, have grown up all the enormous innovations and superstitions of the church of Rome†: And if Dissenters should disco-
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* 1 Cor. xiv. 40.

† The following observations of Dr. Priestley, upon this head, in his View of the principles and conduct of the Protestant Dissenters, p. 59, are very sensible. “ It should be considered,” saith he, “ that a power of decreeing rites and ceremonies, is a power absolutely indefinite, and of the very same kind with those claims, which, in things of a civil nature, always give the greatest alarm. A tax of a penny is a trifling; but a power of imposing that tax is never considered as a trifling, because it may imply absolute servitude in all who submit to it. In like manner the enjoining of the posture of kneeling at the Lord’s Supper is not a thing worth disputing about in itself, but the authority of enjoining it is; because it is, in fact, a power of making the Christian religion as burdensome as the Jewish, and a power that hath actually been carried to that length in the church of Rome. Nor do we see any consistence in

ver any aversion to giving countenance to such a principle, and its genuine consequences, excuse me, Sir, if I think, they are more than pardonable in so doing, and should not have been represented as acting upon no reason at all. I am, Sir, &c.

“ in the church of England rejecting the authority of Rome in these things, “ and imposing her own upon us.” —

Again, p. 66. “ Our ancestors, the old puritans, had the same merit in opposing the imposition of the surplice, that Hampden had in opposing the levying of ship-money. In neither case was it the thing itself they objected to, so much as the authority that enjoined it, and the danger of the precedent. And it appears to us, that the man who is as tenacious of his *religious* as he is of his *civil liberty*, will oppose them both with equal firmness.

“ All the difference then, in the conduct of men who equally value their liberty, will be in the *time* and *manner* of opposing these incroachments upon it. The man of a strong and enlarged mind will always oppose these things in the beginning, when only the resistance can have any effect; but the weak, the timid, and short sighted, will attempt nothing till the chains are riveted, and resistance is too late. In civil matters, the former will make his stand at the levying of the first penny by *improper authority*; and in matters of religion, at the first, tho’ the most trifling ceremony, that is, without reason, made necessary; whereas the latter will wait till the load, in both cases, is become too heavy to be either supported or thrown off.” And by these reasons he supports his remark, p. 58. that “ the opposition made by the first nonconformists to the injunction of a few ceremonies, was an argument of great *strength of mind*; and that they acted upon more just and enlarged views of things, than those who superciliously affect to stigmatize them as men of *weak minds*.” Whether the puritans understood the principles of liberty so thoroughly, and acted upon such enlarged views of things, as they are here represented to have done, I will not pretend to say. Of this, however, I am very certain, that all these observations are true and just as applied to the modern Dissenters.

L E T T E R VI.

SIR,

I OBSERVE in your Commentaries a very remarkable passage, which asserts the absolute necessity of excluding all Dissenters from civil offices, as a thing *essential* to the *very idea* of a national establishment.—You say, “ He,” (that is the magistrate) is bound to protect the established church, by admitting none but its genuine members to offices of trust and emolument: for if every sect was to be indulged in a free communion of civil employments, the idea of a national establishment would at once be destroyed, and the Episcopal church would be no longer the church of England*. That is extraordinary indeed! Some have talked of the security which may arise to the church from this exclusive privilege; and you intimate it yourself, when you say, it is the magistrate’s duty to *protect* the church by this method. Others have insisted upon I know not what kind of alliance or contract, in which this exclusive privilege was stipulated for the church. But that the church would lose her *existence* and *essence* without it, seems to be very strange. What! cannot the church be established in the possession and enjoyment of her own peculiar temporalities, her tythes, prebends, canonries, archdeaconries, deanries, and bishopricks by law, unless she engross all civil as well as ecclesiastical offices to herself? Can there be no legal establishment of, and no legal and national provision made for, a *church*, unless all the offices and emoluments of the *state* are annexed to it? Was there no national church properly established by the law in England till the test-act was enacted, which appropriated all civil offices to persons of her communion, in the reign of Charles the

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* Comment, vol. iv. p. 53.

Second ? And is there none now in Scotland, where civil offices are not confined to the Presbyterians, who have been hitherto supposed to be the ecclesiastical establishment in that country ? Is there, I say, no such establishment in Scotland ? is the very idea of it destroyed, and the Presbyterian church no longer the established church of that part of the united kingdom ? I apprehend this will hardly be affirmed ; and if so, an exclusive right to civil offices cannot be essential to the very idea of a church-establishment*.

INDEED, I would not willingly suppose any thing so unjust can be essential to an ecclesiastical establishment. For certainly good subjects, if they are by law deprived of the capacity of serving their king and country, in those offices for which they are qualified, and which possibly they might otherwise obtain, are injured by such exclusion. I do not say, that the actual possession of civil offices is the right of any subject ; but a capacity of being elected or appointed to them, is the right of every good subject ; and being deprived of that capacity is plainly an injury ; and every injury done a man merely for his religion, and not on a civil account, is, in my opinion, a degree of persecution : I know no other definition of persecution, than that it is an injury

* The paragraph, which gave occasion to the preceding remarks, is greatly altered in the new edition : it now runs thus : “ He,” that is the magistrate, “ is bound to protect the established church : and, if this *can be better effected* by “ admitting none but its genuine members to offices of trust and emolument, “ he is certainly *at liberty* *to do* ; the disposal of offices being matter of favour “ and discretion.” He is bound to protect the established church, saith the learned Commentator : the truth is, he is bound to protect all good subjects, of every religious persuasion ; but none of any persuasion, at the expence of all the rest, and by encroaching on their undoubted rights, amongst which we are to reckon, though not the *actual possession* of offices, yet certainly a *capacity* of being appointed to them ; which is not a “ matter of favour and discretion ;” for every good subject hath a natural right, not to be proscribed as unworthy of the public confidence. Whether sufficient reason can be assigned, for infringing this right in regard to Protestant Dissenters, is considered in the subsequent part of this letter.

jury inflicted on a person for his religious principles or profession only.

A TEST-LAW, appropriating all civil offices to the members of the church, hath been vindicated, even on supposition of its being contrary to the law of nature, by instances of municipal laws, made, in direct opposition to the law of nature, for the public good*. But in such cases, the advantage to the public ought

* See the Bishop of Gloucester's Alliance between Church and State, p. 320. edit. 4.

In Mr. Foster's late visitation sermon (preached at Chelmsford May 22, 1770) entitled, "The establishment of the church of England defended upon the principles of religious liberty." I find the first of the argument for an establishment, together with an exclusion of all but its own members from civil offices, laid upon the following sentiments: "What security," saith the author, "doth the establishment require for its preservation and defence?" To which he answers, "It only doth not put arms into the hands of its enemies. " It requires only, that those who profess to dissent from its doctrines should be excluded from offices of power and influence in the government, that is, they are kept out of situations which would render their opinions dangerous to that mode of religion which the constitution hath adopted and made its own." p. 13. "For every state, as well as every individual," he saith, "hath a right to judge for itself in matters of religion, or to choose its own religion." p. 14. With respect to what is here advanced, as the foundation of the whole superstructure, that "every state hath a right to chuse its own religion as well as every individual;" I observe, that the ground of this inference in these two cases, is very different. The reason, upon which every individual hath a right to choose his own religion, is, because religion is the result of personal conviction, and the rewards of it sought and obtained, not by collective bodies, but by individuals, as the fruit of their own personal character and conduct. In the case of a state, or civil society, choosing a particular religion, those grounds of election which I have mentioned can have no place: the sole interest which a civil society can have in this matter, is its promoting the good order of the community; and this is effectually provided for by the magistrates encouraging the general principles of religion and morality which prevail amongst all parties, and which are by no means peculiar to any peculiar system or mode of worship.

Again, I observe, that by "the state's choosing its own religion," the author

ought to be very apparent, and of considerable moment; and even then, is rather to be considered as an *excuse* for such deviations

thor means, choosing a religion in order to its being established, with exclusion of all but its own members from civil offices and emoluments. A very different case from that personal choice, which every individual makes of a religion for himself. Had he meant no more than that the several members of the state, or the magistrates and persons in office, have a right, as individuals, to judge for themselves as much as any other members of the community; the observation would have been true, but nothing to the purpose. But the right of an individual to choose the religion which he is to profess and practise, and the right of a state to choose the religion which it is to establish, and on the professors of which it is to bestow an exclusive title to its civil offices, are things widely different; particularly in this respect, that the former, the right of an individual to choose his own religion, interferes in no respect with the rights of any other person; whereas the latter, the right claimed by a state first to choose, and then to establish with an exclusive test, a particular religion, does incroach upon the rights of others, by laying upon them an incapacity of enjoying those privileges and advantages to which, in common with their fellow subjects, they have a natural claim.

However, "such an establishment, with exclusion of all but its own members from civil offices," the author saith, "is a measure necessary to be adopted, in order to prevent the ill effects of the peculiar opinions of others, first upon their own passions, and in consequence upon the peace and order of that society, which having chosen and established a different mode of religion, must have the same right to preserve what it hath thus established, that it hath to preserve itself." Upon this I would observe, that the defence and preservation of society in general, and all its members, from the ill effects of the peculiar opinions of the different sects of which it consists; that is, from violence (for the weapons of reason and argument, he immediately adds, are left untouched in their hands) I say, the defence and preservation of all the members of society are abundantly provided for, if the magistrate, as conservator of the public peace, interpose to prevent their persecuting, or any way molesting each other. To consider, as the author does, persons of different religious persuasions as "enemies" when he represents the security of a religious establishment to be that "it only doth not put arms into the hands of its enemies," is, I think, no very liberal notion. But if they are so, I do not see but the influence and authority of the magistrate over the whole community may controul that enmity, and keep it within proper bounds; nor can I think, that partiality to any one sect, taking it into his peculiar good graces to the exclusion of all the rest, will be likely to assuage that enmity; it rather seems calculated

tions from the law of nature, or general principles of equity, in the present imperfect state of Society, than as a full and absolute

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calculated to enflame it, to create no small jealousy in those who have the monopoly of civil offices and emoluments, and no less envy in those who are deprived of them. It is very observable, that a spirit of domination and contention arose in the Christian church in proportion to the increase of the emoluments and power of its ecclesiastics; and that till Christianity was incorporated with the state or civil constitution, in the time of Constantine, there were no examples of the debates and divisions among Christians, issuing in actual persecution of each other, on account of difference in religious sentiment; but no sooner were worldly emoluments connected with the profession of it, and either bestowed by the court, or obtained by the suffrages of the people, than the great struggle was, who should possess them exclusively; and the several parties, as the most effectual means of annihilating each others pretensions, fell to heretie-cating, anathematizing, and persecuting one another. But if the Emperor had favoured all alike, had either distributed temporal emoluments among them equally, or rather had conferred them upon none, I apprehend the peace of the church and the world would not have been so scandalously violated, as it hath been, by contentions for riches and power among the several Christian sects, and especially their respective ecclesiastics, and by their mutual persecutions and violence. The large temporalities with which the church was soon endowed, and the principality which was at length bestowed on the pope raised the church of Rome, and the whole fabrick of popery, to the enormous height to which they afterwards arrived. And from popery the Protestants brought with them, and retained among them after the reformation, an unhappy attachment to the shackles of human authority, and of human inventions and definitions; and as the natural consequence, a rigid, intolerant spirit. In a word, if we examine the matter closely, we shall find, that human inventions in divine worship, human definitions of faith, and the exclusive enjoyment of worldly emoluments, as the reward of adhering to a particular system which happens to be established; these are the things, which have produced whatever there is of an hostile spirit amongst the various sects of religionists, and created all that necessity (if there be any) of mutual self-defence on which the author so much enlarges. Abolish human inventions, and human definitions, which human pride for the credit of the respective parties is always concerned to support, and remove that monopoly of worldly emoluments for which this author pleads so strenuously; and, religion being no longer a matter of secular interest, the speculative differences concerning it will hardly excite more contention than different schemes of philosophy; and its different modes, than different manners and customs in civil life. Men will easily apprehend, as

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lute *justification* of them. However, should an exclusion of good subjects from civil offices on a religious account appear, upon examination,

soon as their ambitious and interested views cease to mislead their judgments, that the essence of religion, which lies in a few general principles, and in good affections and habits, may very well conflict with an almost infinite variety of speculative opinions, and external modes and forms; and unity of affection will establish that peace and tranquillity in the christian church, which by fruitless endeavours after uniformity of sentiment and practice, hath been in great measure, I had almost said, wholly banished from it. Nor can I think, that where men live together in peace and harmony, a diversity of religious sentiments and practices is in itself an evil, or any way prejudicial to society. I am sure, if it be, some more effectual measures should be taken than have yet been taken, to put an end to that variety of sentiment which still subsists amongst the members of the national church, notwithstanding they subscribe and use the same creeds and formularies; nor should that remarkable diversity between the mode of worship in parish churches and cathedrals, be any longer permitted. Indeed, for the same reason no toleration should be allowed; because, under a toleration, there will perhaps be as great a variety of religious sentiments and modes, as if there were no establishment at all: and perhaps a greater; for as Bishop Stillingfleet somewhere observes, “whatever limits, divides;” exclusive establishments, founded upon human creeds and human canons, prevent the scripture from being regarded as the only rule of faith and order, and the only center of union. It is the advancing of these into the room of the scriptures, which hath been the grand source of all the sects, and all the sharp contentions among them, which have ever disgraced and divided the Christian church. And can we then reasonably assert the necessity of exclusive establishments, as a cure for the evils which they themselves have caused?—Whatever uniformity hath been produced by them in respect to human creeds and forms, (in which for my part I can see no advantage) they have often produced likewise, either a great degree of bigotry where the compliance hath been sincere, or of hypocrisy, where, as hath been frequently the case, men have been induced to profess and practise what they disapprove and condemn.

To the objection, that upon the principles of this sermon, “a state hath a right to establish and defend a false religion as well as the true one,—the Koran, the Viedam, and every other the most absurd, and even impious system of doctrine and worship;” the author replies, that he “acknowledges the consequence,” p. 15. “But then doth not the same objection,” saith he, “lie equally against the right of an individual to choose his religion, and defend his choice? This right,” he adds, “cannot be completely exercised in either case, but at the hazard of choosing a false religion.” But there is

examination, not to be at all for the public good, then the very foundation of this defence (such as it is) of an exclusive test is entirely destroyed. The question therefore is, What is that public good arising from a test law, and the exclusion of good subjects from civil offices, which overbalances the right that every such subject hath, on principles of reason and equity, to a capacity of being appointed to such offices?

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this essential difference in the two cases, that the individual who chooses a false religion, seldom doth any prejudice by that wrong choice to any but himself: whereas a state choosing, and establishing a false religion, with an exclusive right of civil employments (which amounts not only to defence, but to encouragement) lays such inducements thereby in the way of all its subjects to embrace a false religion, as few comparatively are able to withstand; and entails likewise this false religion on posterity, by laws, which, while there are great worldly emoluments annexed to the observance of them, will not easily be repealed or altered. And thus such motives as are with the generality irresistible, to the embracing of a false religion, are established and perpetuated, to the entire and perpetual exclusion perhaps of the true religion. And this consequence is the more likely to follow, if, as the author asserts, "every state must have "a right to require, that those who are appointed to the duty of public in- "struction by the state—shall instruct the people in those doctrines which it "hath established, and no other." p. 17. But none of these bad consequences follow from that personal choice, which an individual makes of a false religion. And it is surprising, that these two cases should ever be considered as parallel, or that any sensible man, as the author certainly is, should argue from the one to the other. In a word, true religion, as well as true philosophy, is, I think, more likely to prevail and flourish upon the foot of its own intrinsic evidence, than by the interposition of human authority; which we see, in fact, over the largest part of the world, by far, establishes a false religion, and excludes the true; and indeed nothing else can be expected, when religion depends for its reception and establishment upon princes and politicians, who are too often under the dominion of such maxims and views as are diametrically opposite to its genuine principles and spirit. Whereas if the obstacles, every where raised by human authority to the entrance and prevalence of true religion, were removed; and this heavenly guest suffered to recommend herself to all by the lustre of her native charms, and the evidence of her divine original; I believe, the event would be a wonderful demonstration of the truth of that old adage: *Magna est veritas, et prævalebit.*

UPON the most general view of this point, it cannot appear to be for the good of the *magistrate*, or the *state*, to be deprived of the power of availing itself of *the services of any good subjects*. It is, surely, for the advantage of the state, that none should be rendered incapable of civil employments but those whose affections or principles render them suspected to the civil government; that is, who do not give proper testimony of their being good subjects: for the more numerous the persons are who are capable of such appointments, the greater is the probability of a proper choice, provided those who make it discharge their duty to the public with fidelity and judgment.

IT may be alledged, perhaps, that the magistrate hath wisely consented to grant the church this exclusive privilege in order to obtain the *greater good* of the special services of the church, in inforcing the duties of imperfect obligation, such as gratitude, hospitality, generosity, &c. which human laws cannot effectually inforce; and of an alliance with her, and a right by grant from the church to a supremacy over her, and to the power of appointing her ministers and officers.

WITH regard to the service which the church does the state, by inforcing the duties of imperfect obligation, and by which she is supposed to merit, in part, her exclusive privilege to civil offices; I observe, that if this be a reason for allowing capacity of civil employments to good subjects of any one religious persuasion, it is a valid reason for extending it to good subjects of all religious persuasion, and in particular, to the Protestant Dissenters. For, in their religious assemblies, these virtues are inculcated, perhaps with as good effect, and with as much utility to society, as amongst Christians of any other denomination. Upon this state of the case, therefore, no sufficient cause can be assigned, why they should be excluded from a reasonable and proportionable share of the favour of the state.

As for the church's giving up her independence and supremacy, and the appointment of her officers or ministers, to the state; it may be proper to enquire, to what this concession, on the part of the church, may be supposed to amount. And here it should be remarked, that the state hath a right to a supremacy over all persons, whether clergy or laity, of every religious persuasion, within her dominions; a right, founded in the nature of civil government, independent of any grant from the church; and in this sense, the church could confer upon the state no supremacy which it had not before; she could not give it any new subjects, or increase its civil power.

THE meaning, therefore, of this grant of supremacy must be, that the church admitted the state to a supremacy in causes ecclesiastical, and to the appointment of her church officers; in lieu of which she claims an exclusive right to the possession of civil offices. And these, it is said, are the terms of the grand alliance between the church and state, upon which is grounded the equity of a test-law, excluding all from the possession of civil offices, except the members of the established church. But it doth not appear, that any such terms were ever concerted and agreed between the church and the state; it appears, on the contrary, that no such *can be* supposed or *implied*, on any fair and equitable principles. For, all the peculiar temporalities of the church being solely the grant of the state, and her particular form and constitution being established by its laws, the government of the church of course belonged to that authority which formed and endowed it; and when the state appoints the ministers and officers of the church, she doth it upon this footing, that the provision made for their support is her donation and establishment. Now, on this ground, the state was in undisputed possession of all the power of church-government, and of the appointment of church-officers, which she at present enjoys, before any test was appointed, or nonconformists were by law excluded from civil offices. This exclusive right, therefore,

now claimed by the church, to the offices of the state, could be no part, no term, no condition, of the supposed *original* treaty of alliance between the church and state. The claim is entirely *novel*; it is an usurpation upon the state, an attempt to introduce a new term or condition into the original contract, which ought therefore to be rejected as inadmissible.

IF it be said, that the church hath purchased this exclusion of Protestant Dissenters from civil offices, by consenting to a toleration of their religious profession and worship; I observe, that this free enjoyment of their religious liberty was a natural right, of which they were never deprived but with manifest injustice; and the granting of their religious liberty, therefore, or the repairing of one act of injustice, can never be considered as a sufficient reason, or tolerable excuse, for a violation of their civil rights; that is, committing another act of injustice.

IF it be further alledged, that the church's exclusive enjoyment of civil offices comes in as a balance to the toleration, as an accession of strength to the church; in order to counterpoise the danger which might accrue to her, were Dissenters admitted to a free enjoyment of civil offices*: (whereas her security before

* Thus argues the author of *The Alliance*, &c. p. 296, 297. and gives himself the credit of being of the same sentiments with King William, whom he styles, perhaps justly, the best and greatest of our monarchs; applauding his equal conduct in his different stations of Prince of Orange and King of England: which conduct he thus represents. "When King James, a *Papist*, demanded of his son-in-law, with whom he was then on good terms, his *probation of a toleration and abolition of the test*, the Stadholder readily concurred with the scheme of a *toleration*, but utterly condemned an *abolition of the test*. When afterwards he became King of a free people, the *Protestant Dissenters*, likewise, in their turn, demanded both. His conduct was uniformly the same. He gave them a *toleration*, but would not consent to *abolish the test*." The only fault I find with this account is, that it is not *history*, but *fable*. The fact is, that when King James asked the Prince's approbation of the abolition of the test, he meant, and the Prince understood him to mean, a repeal of it as to the *Papists*, as well as the *Protestant Dissenters*; and it was with

before the toleration consisted in this, that every man, whether in or out of office, was by law considered as a member of the church,

with respect to the former, the Prince refused his approbation. When afterwards he became King of England, he was so far from refusing the *Protestant Dissenters* the repeal of the test as to *them*, that he had the design very much at heart: he signified it in council, and in a speech on the occasion, earnestly recommended it to his parliament, that while he “doubted not they would sufficiently provide against Papists, they would leave room for the admission of all Protestants that were willing and able to serve;” adding, “that conjunction in my service will tend to the better uniting you amongst yourselves, and the strengthening you against your common adversaries.” And accordingly, when a clause for repealing the test as to Protestant Dissenters, which was inserted in the bill for settling the oaths, was rejected; the King, being resolved to pursue his design, procured another clause to be proposed to be inserted in the same bill, in order to qualify all persons for places, who, within a year before or after their admission into them, had received the sacrament, either according to the usage of the church of England, or *in any other Protestant congregation*: which clause was also rejected, notwithstanding the influence of the court in its favour. See Tindal’s continuation of Rapin, vol. i. p. 120, —123, edit. 1758. The conduct of the Prince and the King was equal and confident; but, as we have seen, totally different from the ideas of this author.

It should be observed, that the original design of the test was, not to exclude the Protestant Dissenters, but the Papists. See Burnet’s History of his own Times, vol. i. p. 347—352, first edit. It was brought in by the patriots in the reign of Charles the Second, under their apprehensions of Popery and a popish successor; and is styled, an “Act for preventing dangers which may happen from Popish Recusants;” and the same is said to be its design in the preamble. And when, during the debate in the House of Commons, it was observed, that it was drawn in such a manner as to comprehend the Protestant Dissenters, the court-party endeavoured to avail themselves of that circumstance in order to defeat the bill. But the dissenting members disappointed them, by declaring, that they had rather confide in the justice and generosity of parliament to pass some future bill in their favour, than be the occasion of retarding or defeating the security, which the present bill was calculated to afford to the liberties of their country. And this genuine patriotism facilitated the passing of a bill then depending in the Commons, for their relief from the penal laws; (See Grey’s Parliamentary Debates, vol. ii. p. 36. 38, 83.) which being sent up to the Lords, and coming down with some amendments; whilst

the

church, and indispensably obliged to conformity): I say, should be this alledged, it will come under consideration, when we examine

the Commons were debating those amendments, the parliament was suddenly prorogued through the resentment of the court, and the intended favour to the Dissenters prevented. See Grey's Parliamentary Debates, vol. ii. p. 180. And when afterwards, in the year 1680, a bill in favour of the Dissenters, repealing the 35 Eliz. c. 1. passed both Houses, and lay ready for the royal assent, the court ventured upon a very extraordinary expedient: the clerk of the crown was ordered to convey away the bill; and, accordingly it was never afterwards to be found. Burnet, *ubi supra*, p. 494, 495.

In the same session, on the 16th of December, a bill was brought into the Commons, " for uniting his majesty's Protestant subjects to the church of England," (See the Journal) which repealed the declaration of assent and consent, and some other particulars usually objected to by the Dissenters. See Grey's Parliamentary Debates, vol. viii. p. 201. And whereas, it was apprehended this bill might not comprehend all the Dissenters within the pale of the church, there was another bill brought in at the same time " for exempting his majesty's Protestant subjects dissenting from the church of England, from the penalties of certain laws;" which is the title of the present toleration act. Both these bills were read a second time; the former the 21st, and the latter the 24th of December; and referred to the same committee. But though the disposition of the parliament was thus favourable to the Dissenters, it hath been asserted by some writers in favour of the Test, and I believe, generally taken for granted, that the design was to exempt Dissenters only from the penal laws, and not from those laws which excluded them from offices. But whoever consults the Journals will find, that on the 24th of December in the same session, a bill was ordered into the Commons to repeal the Act 13 Car. 2. stat. 2. c. 1. entitled, " An act for the well governing and regulating of Corporations;" which had been made on purpose to exclude Dissenters from Corporation offices. On the 6th of January this bill was read a second time, and referred to a select Committee. And in the mean time, on the 3d of January, a bill came down from the Lords, entitled, " An act for distinguishing Protestant Dissenters from Popish Recusants." I have no doubt, that this bill was designed to exempt Protestant Dissenters from the Test-act; which was professedly made to prevent dangers which may happen from Popish Recusants, and there are no other persons expressly mentioned in the act to whom it can refer. The order of the House of Lords (as I find by the Journal) to the Committee concerning Protestant Dissenters, on the 29th of November, is, " that they prepare a bill for explaining such laws, as were in-

" tended

mine the nature of the *security* which the church derives from an exclusive test. For if this plea of public good, as the basis of

“ tended only against Popish Recusants, and are put in execution against Protestant Dissenters, to their great grievance;” without any direction, either then or afterwards, as far as I can find, for inserting a clause to except the Test-act; a step which seems to have been very requisite, if the Test-act was not to be affected by this bill; for that act was exactly in the same predicament with the other laws against Popish Recusants; it mentioned them only, and yet by construction was capable of being extended, and accordingly was extended, to Protestant Dissenters. Besides, if the bill had been intended to have no further influence and operation than merely upon the old penal laws against Popish Recusants, and not upon the Test-act, it would have been entirely needless; the security of the Dissenters from those laws being effectually provided for by the bill at that time depending in the Commons for exempting his majesty’s Protestant subjects, dissenting from the church of England, from the penalties of certain laws; which, as appears from Grey’s Parliamentary Debates, was designed to procure the Dissenters the full liberty of their religious profession, free from the molestation of penal laws. The bill, therefore, for distinguishing Protestant Dissenters from Popish Recusants, I am persuaded, was designed to comprehend a virtual repeal of the Test as to Protestant Dissenters; and the rather, since, understood in this latitude, it seems a proper counterpart to the bill for the express repeal of the Corporation-act, at that time depending in the Commons: and indeed the Test-act could no way be repealed, with respect to Protestant Dissenters, so properly, as by distinguishing between them and Popish Recusants; the act being designed to remain in force, with respect to the latter, against whom it was originally intended. It is, I think, remarkable, that, as far as appears, there was no division upon any one of the bills which I have mentioned. Nevertheless they were all defeated by the sudden prorogation of the parliament on the 10th of January, but four days after the last bill was sent down from the Lords; the Commons being apprized of the king’s intention only time enough to pass in haste a few votes on the state of the nation; the last of which is in these words: “ That it is the opinion of this House, That the prosecution of Protestant Dissenters upon the penal laws, is at this time grievous to the subject, a weakening of the Protestant interest, an encouragement to Popery, and dangerous to the peace of the kingdom.” The parliament was soon after dissolved by proclamation. Thus the continuance of the Test-act, to the present time, and the exclusion of the Dissenters from all public offices, is the reward they enjoy for their generous and disinterested patriotism.

of an exclusive test, does not relate to the good of the state, perhaps it may be the good of the church.

AND, doubtless, it is for *her good*, in one sense; namely, for her *emolument*, that her members only should enjoy civil offices. But, provided this claim does not appear to be *fair* as well as profitable, it would be an ill compliment to the church to suppose her capable of continuing and maintaining it. And where, indeed, is the *equity* of her demanding, besides that ample provision which is made for her support by law, and to which the whole nation contributes, an exclusion of all who are not in her communion from the opportunity of serving their king and country, and enjoying the honours or emoluments of such services? Where is the equity, I say, that instead of being satisfied, not merely with her own peculiar revenues, but with that share of civil offices and emoluments which would fall to the members of

It may be further observed, that this particular test, receiving the sacrament according to the rites of the church of England, as it was designed, so it was calculated, to exclude the Papists, rather than the Protestant Dissenters; for the former, it was apprehended, would not comply with the established church in this office above all others; and to increase the difficulty on their part, they were expressly required, besides the oaths of allegiance and supremacy, to renounce transubstantiation; whereas it was, at that very time, no uncommon thing for Protestant Dissenters, to receive the sacrament occasionally in the church of England, in order to express their charity towards it as a part of the church of Christ. This was the case with Mr. Baxter, Dr. Bates, and others of their leading clergymen, as well as many of their laity. Indeed, after the test was enacted, many of these altogether abstained from this practice; because they would not act upon a suspicious motive, and because they totally disapproved the use of a religious ordinance as a civil test. But this consequence of appointing the sacrament as a test, was not likely to be foreseen at the time the act was enacted. And therefore, I think, we may on the whole infer with reason, that it was not particularly levelled against the Protestant Dissenters. If it had been the design of the legislature, to exclude all from civil offices but those who have a real affection for the constitution and worship of the church, they would doubtless have appointed the test to be, not merely once taking the sacrament at church, but a stated and constant conformity to all its religious services.

of her communion, and which undoubtedly would be by far the largest and most considerable, she must possess an exclusive right to the whole? and where, in reason and justice, is her title to such a monopoly? The kingdom of Christ is not of this “world;” and religion, much less any peculiar form of it, can be no foundation for a claim to all civil offices and emoluments in any country; because *dominion is not founded upon grace*, nor are the *saints of any communion*, as such, entitled to all those good things, which those who are possessed of dominion have to bestow.

THESE are principles so just and indisputable, that some of the warmest friends of establishments and exclusive tests have been forced to confess, that they are neither of them, founded in *truth*, but in *utility*; that when a particular religion is established by law, and fenced with the sole and exclusive privilege of enjoying civil offices and emoluments; this is not done on account of its being the *true religion*, but the *religion of the majority*; which, as such, is taken into alliance by the state, and so established and privileged for the public good. Provided therefore, it can be shewn, that this goodly fabrick no way contributes to public utility, it cannot any longer be supported, but must fall to the ground.

As for the supposition, that it conduces to the utility of the *state*, that I have already considered. As for the utility of the *church*, if by that be meant her profit or emolument, she should, as I before observed, insist upon no gain but that which is fair and honourable, none to the prejudice of other good subjects, where they have a just and equitable claim.

BUT if this public utility is understood to refer to the *security* and *protection*, which is apprehended to be afforded to the church, by the exclusion of all others, except the members of her own communion, from civil offices; that is a point which remains now to be considered: For you tell us, “ that the magistrate is bound to *protect* the established church, by admitting ‘none but is genuine members to offices of trust and emolument.’”

THE danger of the church, and the strength of that security which is afforded by a test-law, in case she be in danger, hath, I think, been greatly magnified. Indeed, her danger seems to be a mere chimera. I am persuaded, the church would be in no danger from the Protestant Dissenters, who have very little disposition to molest her; and would have less still, if she left them in full possession of their civil rights. The removal of any odious mark of distinction, and ground of jealousy and envy as it leaves men more at ease, so in greater good humour with themselves and others, and very little disposed to quarrel about modes of faith and modes of worship. That is not, indeed, at all the temper of the present age; nor is it likely to be so of their posterity, unless the spirit of persecution should arise in the church or state. That would set in motion a certain spring and elasticity there is in human nature, which rises against oppression. But in quiet and peaceable times when principles of moderation and liberty universally prevail, this elastic spring is wholly relaxed. And the more liberal and equitable, therefore, the temper and conduct of the church and state are, towards men of different religious persuasions, who are good subjects, the less danger is there of molestation to either. An equitable disposition in the church, to permit all without exception to enjoy in their full extent, their natural rights, would be a much greater security to her, than any exclusive or even penal laws. For the principles of impartial liberty form the prevailing character of the present age, and are, in a manner, universal amongst the Protestant Dissenters. Liberty, religious liberty especially, is their idol; in their attachment to which, for the most part, they are more tenacious, than they are in their affection to any peculiar distinguishing tenets, which divide them from the church, or from one another. And this liberty they would no more violate in others, than be easy to see it violated in themselves.*

BUT

* Dr. Burton, (in his *Commentariolus Thomæ Secker, Archiep. Cantuar. memoriarum facer.*) speaking of the opposition which hath been made to the scheme

BUT if any could be found, who were disposed to give the church molestation, while she hath so vast a majority in the F f 2 kingdom,

of establishing bishops in America, exclaims, “ Iniqui homines & maligni ! qui “ libertatis, quam ipsi sibi arrogant esfrænatam, jus aliis a se dissidentibus “ concedi nolunt !” I am not certain whether these words refer to the American Presbyterians and Independents, or to the English Dissenters. Perhaps the Doctor would have no great objection to our understanding them both of the Americans and Dissenters; for he does not seem to have much complaisance for either. However that be, I may venture to say of both, that so far from showing themselves, by their opposition to this scheme, to be the enemies, I apprehend, they have shewn themselves to be the friends of liberty. When they are convinced, that the scheme of sending bishops to America hath not the advancement of ecclesiastical power in view, and will not be prejudicial to the liberty of christians of other persuasions; when the plan shall appear to be solely this, not only that the bishops shall be invested with the mere powers of confirmation and ordination, and of regulating their own clergy, but shall be excluded, by express act of parliament, or by provincial acts previously passed, and solemnly ratified by act of parliament, in some such manner as the acts of security of the two churches, in the union between England and Scotland) from enjoying the least degree of temporal power; (always supposing, that the salaries for their support shall be drawn only from those who profess to be of the Episcopal persuasion;) then, I apprehend, if I may judge of the Americans by what I have heard of them, and of the Dissenters by those with whom I am acquainted, they will be so far from opposing, that they will be advocates for such a scheme. And in so doing they will allow others the very same liberty which they claim themselves. For, though they are friends to liberty, they are enemies to temporal power in the hands of ecclesiastics, presbyters as well as bishops. Some things have dropped from the archbishop, in his letter to Mr. Walpole, which give ground to surmise, that the whole of what is intended, is not so mild and moderate as his panegyrist supposes. “ The proposal is, saith the archbishop, that the bishop shall exercise such jurisdiction over the clergy of the church of England in those parts, as the late bishop of London’s commissaries did, or such as it might be thought proper that any future commissaries should;” (and who knows what that may be?) “ if this design were not to take place,” p. 2. And to the question, “ How any persons can undertake to promise, that no additional powers shall hereafter be proposed and pressed on the colonies, when bishops have once been settled ?” he answers, that strictly speaking, nothing of that nature can ever be promised in any case,” p. 6. 7. And he saith, “ that there seems no necessity

kingdom, and especially in both Houses of Parliament, (and I cannot see, that the repeal of the test would make any alteration

“ sity, that the affair ever should come into parliament; for, as the law now stands, suffragan bishops may be ordained with the king’s approbation; and the bishop of London may send these, instead of presbyters, for his commissaries,” p. 21. If the American Presbyterians and Independents, and their friends the Dissenters in England, are more jealous than they need be of the scheme of sending bishops to America, it is owing to the evident reluctance there is in the most moderate patrons of this scheme, to the Episcopal power being laid under any positive restraint or limitation, and to their expressing a desire of having that matter left entirely open; as well as to the conduct of the society for propagating the gospel, who expend a great disproportion of their revenues in countries where Christianity is already in a flourishing condition: with what other view than to proselyte the inhabitants to Episcopacy, it is difficult to say; they employ a great number of missionaries in the northern colonies, and very few comparatively in the southern: I say the southern episcopal provinces have been comparatively neglected, from the time that a few presbyterian or independent ministers in New-England conformed to the church, and came to England for orders; to defray the expence of whose settlement, as missionaries in the colonies from whence they came, the society came to a RESOLUTION “ to suspend complying with any other of the many requests made them for the supply of several vacant churches upon the continent of America.” Abstract for 1722. p. 46. And from that period these colonies have been objects of peculiar attention. It is natural for this conduct to create a jealousy in the Presbyterians and Independents in those parts, of an undue spirit of encroachment in these episcopal brethren: especially, as their missionaries are, many of them of the old *jure divino* stamp, who think Episcopacy and the uninterrupted succession, essential to the validity of religious ordinances, and to the Christian as well as the ministerial character: who declare, in the words of Bishop Beveridge, that “ the apostolical line hath through all ages been preserved entire, there having been a constant succession of such bishops—as were truly and properly successors to the apostles by virtue of that apostolical imposition of hands, which being begun by the apostles, hath been continued from one another ever since their time down to us; by which means, the same spirit which was breathed by our Lord into his apostles, is together with their office transmitted to their lawful successors, the pastors and governors of our church at this time:” (Beach’s Calm and Dispassionate Vindication of the Professors of the Church of England, p. 5.) Who assert, that without this uninterrupted succession, “ there can be no ministers of Christ,” p. 4. that the people’s acceptance with God depends upon it, p. 8. and that “ if the power was once lost, none

tion in this respect) the apprehension of danger from the Dissenters being admitted to such offices as a few amongst them may be

“ none could renew it or begin a new succession, till Christ was pleased to send
 “ new apostles,” p. 6. and that “ could this point once be made clear, that
 “ this succession hath been interrupted, it would also prove further, that Christ
 “ hath neglected to provide for his church in a case so essential to the very
 “ Being of it, notwithstanding his having expressly promised to be ever with it
 “ to the end of the world : that if the succession be once broken, and the power
 “ of ordination once lost, not all the men on earth—not all the angels in hea-
 “ ven, without an immediate commission from Christ, can restore it.” Dr.
 T. B. Chandler’s Appeal to the Public in behalf of the Church of England in
 America; published at New-York 1767. A pamphlet now before me, wrote at
 the appointment and according to the directions of a CONVENTION of missionaries,
 to promote the design of sending bishops to America.

Upon these principles it is not at all surprising to find missionaries asserting, that “ not only without any authority from God or Man, from Church or
 “ State, but in defiance of both, were the New-England Churches first set up.” Beach. p. 27. For they imagine that the Church of England is, in virtue of
 the act of uniformity, established in the colonies; laying it down as a maxim,
 that “ colonies transplanting themselves, carry the laws of their mother coun-
 “ try with them.” Wetmore’s Appendix to Beach’s Vindication, p. 63. A
 very different opinion from that of Bishop Giblon expressed in a letter to Dr.
 Coleman, May 24, 1735, that “ the religious state of New-England is found-
 “ ed in an equal liberty to all Protestants, none of which can claim the name
 “ of a national establishment, or any kind of superiority over the rest.” Agree-
 ably to a declaration of the *Lords Justices*, in a letter to Governor Dunbar in
 the year 1725, that “ there is no regular establishment of any national or pro-
 “ vincial church in these plantations.” Now it is but natural that missionaries
 of the principles before-mentioned should declare it to be “ the business they
 “ are employed in to endeavour to proselyte men from every sect to the com-
 “ munion of the established church.” Wetmore’s Vindication, p. 6. In which
 they do but obey a standing instruction of the society, that “ they frequently
 “ visit their respective parishioners, those of their own communion, to keep
 “ them steady in the profession and practice of religion, as taught in the church
 “ of England, and those that oppose them or dissent from them, to convince
 “ and reclaim them*.”

I may

* For the quotations from Mr. Beach and Mr. Wetmore, and from Dr. Coleman’s Life, I am indebted to Mr. Hobart’s Second Address to the Members of the Episcopal Separation in New-England; a pamphlet published at Boston, 1751.

be qualified for, and likely to obtain, must be entirely groundless. It is my firm opinion, that the repeal of the test would be a greater

I may now appeal to any man of common understanding, what impressions such enormous claims advanced by the missionaries in the colonies, are likely to make upon their non-episcopal inhabitants; and whether they are not calculated to raise in them incurable jealousies of the growth of episcopal or ecclesiastical power. It is very unhappy, if the society, as the Archbishop intimates, p. q. can procure "few to go from hence, in the character of missionaries, but persons of desperate fortunes, low qualifications, and bad or doubtful characters;—a great part of whom," faith he, are "Scotch; and I need not say," he adds, "what chance there is, that episcopal clergymen of that country may be disaffected to the government."

In what I have said, I have no more design than the Archbishop had, to fix an odium on the society; I wish both its conduct and its missionaries may in every respect be unexceptionable and honourable; and to that end, that those members of it who are men of wisdom and moderation, may be always disposed to take that lead in its councils and determinations, which their numbers and influence must naturally give them. However, I could not, upon occasion of this rhetorical attack of Dr. Burton, but think it very expedient just to point out some of the grounds of those apprehensions, which the scheme of sending Bishops to America hath raised in the colonies. And I really think, in this state of things, the Americans, those especially who are not of the Episcopal persuasion, may reasonably expect some strong barrier some effectual security, supposing bishops sent to America with spiritual characters only, against their assuming, or possessing afterwards, any degree of temporal authority. And unless this be done, the opposition of them and their friends here, to such a design, is no proof that they are enemies to the liberties of others, but only that they are willing to preserve their own.

What I have said is on supposition, that the slate interposes in sending bishops to America. But the Presbyterians and Independents in those parts apprehend, that if bishops are settled among them *by the slate*, it will destroy that equality which subsists, and which, (notwithstanding what Dr. Burton asserts to the contrary) they are willing should subsist, between themselves and Episcopalians; and will give the latter a *superiority* to all other denominations. They have no objection to the Episcopalians procuring themselves bishops, or persons invested with a *spiritual power* of ordaining, confirming and superintending (as Dr. Chauncy of Bolton in his controversy with Dr. T. B. Chandler expressly asserts) provided they will be contented to stand upon the foot, upon which *they themselves* stand, of *permission and protection, not of authority; of toleration, not of establishment.*

a greater disadvantage to the Body of Dissenters, than to the established church; that it would rather diminish than increase their numbers. For, in general, men are not much inclined to shock all the principles on which they have acted; and desert a party with which they are connected, at once on a lucrative motive; but they may be gradually softened and relaxed in their principles, by the new connections into which the possession of public offices would introduce them, by the influence of general custom, and of what is esteemed polite and fashionable, and by the example of their superiors, or of the majority; provided they are not disgusted and revolted by any ungenerous compulsion or restraint. In such circumstances, no considerable numbers, if any, would be found mad enough to embark in the dangerous enterprize of overturning an establishment, so well guarded and fenced by law, as that of the church of England, and to which the nation hath been so long accustomed. And provided, in any future time, she should be improved in her constitution, in her public forms, and in the terms of conformity to her lay and ministerial communion, there would be no human prospect, scarcely a possibility, of shaking her foundations, should any be inclined to attempt it. For, the broader the basis on which she stands, she stands the firmer. And therefore, comprehensive, not exclusive measures should, in all prudence be adopted and pursued by those who would approve themselves her truest and best, as well as warmest friends.

IF, to all these considerations, you should oppose the destruction of the ecclesiastical constitution, in the last century, by the sectaries: I beg leave to observe, that the true cause, and at bottom the only cause, of the overthrow of the church at that time, was, that her leading men and governors had been, in some cases,

establishment. And indeed, if the state do interpose in settling bishops in America, then, as I said before, all circumstances considered, some effectual security against their assuming, or being permitted to assume, improper powers may in all reason be expected.

cases the authors, and in others the instruments, of civil as well as ecclesiastical tyranny. Their oppressions and persecutions had been deeply felt by the puritans, who had some zeal for religion; and their slavish doctrines, and arbitrary measures, pernicious and fatal as they were to civil liberty, had given such a turn to men's minds in general, as enabled some religious zealots, in conjunction with the Scots, who insisted upon the destruction of Episcopacy before they would move to the assistance of the Parliament when their affairs were at a low ebb, to overturn the ecclesiastical constitution. But what is the inference from hence? that the permitting of the Dissenters to enjoy the common rights of good subjects, would endanger the church a second time? I think the reverse: that, as the tyranny of the church and state proved, by a strange concurrence of circumstances, the ruin of both; lenity and some degree of the same magnanimity in this case, which you say, was discovered in the toleration, would, in this instance as well as in the former, tend to her establishment and preservation. For, as we see in fact, that every instance of it, which hath been hitherto exercised, hath had that effect; we have reason to conclude, that every further instance of it would undoubtedly have the same.

BESIDES, what security can be derived to the church from a man's now and then receiving the sacrament in it, for the sake of a good place? That is, I own, a mark of *his affection for the place*; but very little, I am sure, of his affection for the church; to which he may, notwithstanding a compliance obtained by a bait so alluring, be still a false friend, or a determined enemy.

AND, as there are these objections to a test in general, affecting Protestant Dissenters; so there are some, I think, no inconsiderable ones, to the particular nature of the test by law appointed; namely, that leading persons to take the sacrament with wrong views, who would not otherwise do it at

at all, and who have no proper notions of, and right dispositions for it, it gives ground to consider it as an abuse of a sacred ordinance, which was appointed for the ends of religion only, to temporal and worldly views and purposes ; and as a strong temptation to hypocrisy : and though they are criminal who do not resist it ; yet, neither are they innocent, who lay the snare in their way.

I am,

Sir, &c.

G g

L E T -

L E T T E R VII.

SIR,

IT will be found, I believe, that the observations which I have occasionally made upon the character of the Protestant Dissenters are strictly just: that their principles are calculated to render them the firm and invariable friends of the civil constitution of their country. You observe, that "in all ages and countries civil and ecclesiastical tyranny are mutually productive of each other*." I think it must be equally true, that *religious* and *civil liberty* have a reciprocal influence in producing and supporting one another; and accordingly the Protestant Dissenters are at least as likely as any, to be warmly and steadily attached to both. I cannot forbear, therefore, taking notice, with surprize, of a passage in your chapter of *Præmunire*, which, notwithstanding I have endeavoured to put the most favourable construction upon it, I cannot reconcile to the supposition of your having any tolerable idea, what the principles are which generally prevail amongst the Protestant Dissenters. After a very extraordinary panegyrick upon the church of England, and the clergy of her persuasion†, of which I am not inclined in

the

* Comment. vol. iv. p. 103.

† " It is the glory of the church of England, you say, as well as a strong presumptive argument in favour of the purity of her faith, that she hath been (as her prelates on a trying occasion once expressed it: Address to Jam. II. 1687.) in her principles and practice ever most unquestionably loyal. The clergy of her persuasion, holy in their doctrines, and unblemished in their lives and conversation, are also moderate in their ambition, and entertain just notions of the ties of society and the rights of civil government. As in matters of faith and morality they acknowledge no guide but the scriptures, so, in matters of external polity and of private right, they derive all their title from the civil magistrate; they look up to the king as their head, to " the

the least, to dispute the propriety, you give us a striking contrast in these remarkable words: "Whereas the principles of those who differ from them, as well in one extreme as the other, are equally and totally destructive of those ties and obligations by which all society is kept together; equally encroaching on those rights, which reason, and the original contract of every free state in the universe, have vested in the sovereign power; and equally aiming at a distinct independent supremacy of their own, where spiritual men and spiritual causes are concerned."

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POPISH

" the parliament as their lawgiver, and pride themselves in nothing so justly, as in being true members of the church emphatically *by Law* established. " Whereas the principles of those who differ," &c. It cannot be doubted, that a clergy so holy and moderate and unambitious, and so warmly attached to the *SCRIPTURES* as their *ONLY guide in matters of faith and morality*, and to the civil magistrate in respect to matters of external polity, will do their utmost to procure a reform of various particulars in their ecclesiastical constitution, discipline and worship; and especially a repeal of the twentieth article, by which the *CHURCH* is said to have *power to decree rites and ceremonies, and authority in matters of faith*; and likewise of the law, by which the *four first general councils*, in conjunction with the *scriptures*, are made judges of heresy.

* Comment. vol. iv. p. 103. This passage being altered in the new edition, runs thus: "Whereas the *notions of ecclesiastical liberty* in those who differ from them, as well in one extreme as the other (*for I here only speak of extremes*) are equally and totally destructive, &c." What notions of ecclesiastical liberty the learned gentleman ascribes to the church of Rome, I know not; unless by this phrase he means that independence upon the state, and that superiority over it, which she does indeed arrogate to her governors. But though this claim as I have said above, is inconsistent with the rights of civil government and the foundations of society; yet the notions of ecclesiastical, or rather religious liberty, amongst the Protestant Dissenters are essentially different. Liberty in their sense is not a claim of power, much less of supremacy, as in the church of Rome: it is on the contrary a protest against all power in matters of religion, either in themselves or others; for they allow of no power but that of the civil magistrate. An observation, which is sufficient to shew, that their notions of liberty do not interfere with any rights of society or of civil government.

POPISH principles, undoubtedly, are one extreme to which you here allude ; and, I think, dissenting principles, at least, when they are carried to their utmost length, must be the other. It is true, the examples, which you immediately produce in support of this branch of your assertion, are of some enthusiasts both at home and abroad in the last century. " The dreadful effects," you say, " of such a religious bigotry, when actuated " by erroneous principles, even of the Protestant kind, are suf-
" ficiently evident from the history of the Anabaptists in Ger-
" many, the Covenanters in Scotland, and that deluge of sec-
" taries in England, who murdered their sovereign, overturned
" the church and monarchy, shook every pillar of law, justice,
" and private property, and most devoutly established a king-
" dom of the saints in their flead."

THE only objection I think proper to make to the sentiment suggested in this round and warm paragraph, is, that it cannot vindicate the universality of your censure on the principles of those who, among Protestants, differ from the church ; unless upon supposition, that the principles of all Protestant Dissenters are of the same nature and tendency with those, which being carried to an extreme by the Anabaptists in Germany, and the Fifth-monarchy-men in England, in the last century, produced very extravagant consequences. This construction offers itself

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By the parenthesis, which the author hath inserted, " (for I here only speak of extremes)" I suppose he means to suggest, that in this passage he had not the Dissenters directly in view, but the Anabaptists in Germany, and the Fifth-monarchy-men in England, and the like enthusiasts in the last century. Nevertheless this very parenthesis confirms the apprehension, that he esteems the principles of these enthusiasts to be only the extremes of dissenting principles ; that they are the same in kind, though not in degree, these enthusiasts having carried them to the utmost length. What follows therefore in this letter, to shew the essential difference and absolute contrariety between the principles of the Dissenters on the one hand, and the principles of these Enthusiasts and of the Papists on the other, holds equally good against the passage as it is now amended, as it did in its former state.

so readily, that, if it was not your intention to stigmatize the Dissenters of the present age in any degree, but only some particular enthusiasts of the last age both at home and abroad, it might surely have been expected, that some exceptive or qualifying expressions should have been inserted in their favour. And after what you have said of the modern Dissenters, in your Reply to Dr. Priestly, I hope this will be done in future editions.

IN the mean time, as I apprehend this paragraph will be understood to intimate, that the Dissenters hold principles unfriendly to society, and to civil government; principles which, in the extreme, have produced the most fatal effects, both at home and abroad; in justice to them, (though not in opposition to you, if you really do not intend this censure for them,) I shall offer a few remarks, in order to show, that the principles of the Dissenters are entirely the reverse, both of popish principles, and of those enthusiastic principles which you mention, and can never produce the dreadful consequences to civil government which flow from either.

THE church of Rome, indeed, asserts her own supremacy over the civil power, in every country*. And accordingly she demands

* This claim the church of Rome hath always advanced, and wherever she hath had opportunity, exercised; without ever in a single instance giving it up. Since the Reformation, the times have been daily growing more unsavourable to the exercise of that enormous power, which formerly held the civil authority all over Europe in absolute subjection and dependence. But the church, ever attentive to her favourite supremacy, still takes every method to prevent its further depression, and even to restore it, if possible, to its former glorious exaltation. With this worthy design, a large folio volume, in Latin, in a small type, was printed in England (without any name of place or printer) in the year 1753, (of which I have a copy now in my hands,) under the care of the Jesuits, and the impression sent to Portugal, for the use of the ecclesiastics in that kingdom. It is intitled, *Opusculum-Theologico-Juridicum, de utroque Recursu: in Judicem, scilicet, competentem et incompetentem: quinque libris distinctum: in quibus agitur, in lib. 1. De Recursu ad Judicem competentem, puta ab Ecclesiastico ad Ecclesiasticum, de seculari ad secularis, vel ad Ecclesiasticum*

demands an absolute submission in all her members, subversive not only of the rights of a free people, but of all the obligations of society, and the very foundations of civil polity. She claims an utter exemption of all ecclesiastical persons, and of all their rights and possessions, from the jurisdiction and authority of the magistrate. But is there the least similarity to this, in the sentiments of the Protestant Dissenters? No, certainly. It is their opinion, I own, that the magistrate should not expect, much less exact, obedience or submission in matters purely religious; and that, in things pertaining to conscience, it is the duty of the subject to act upon the principle of the apostles and primitive Christians; that is, to "obey God rather than men*." But then there is nothing in this sentiment, in the smallest degree, inconsistent with *civil obedience*: "rendering unto

secularum Superiorum: in 2do vero, De eodem ad *Judicem INCOMPETENTEM*; puta, ab *ECCLESIASTICO* ad *SECULARIA TRIBUNALIA*, &c. So that, according to the doctrine which this book is intended to establish, by an infinite number of reasons and authorities (such as they are) from the decrees of Popes, of councils, of the holy office of Inquisition, and of numberless Romish canonists, and casuists, the *civil power* hath NEVER any controul over the *ecclesiastical*, but the *ecclesiastical* ALWAYS over the *civil*. And even the power, assumed and exercised by the Popes in the darkest ages, of deposing emperors, kings, and all other princes and magistrates, is explicitly asserted and maintained. This work, so much adapted to promote the glory of holy church, is published under the patronage of the King of Kings: *Sub Regis Regum patrocinio, omnibus Regibus Principibus, ad Judicibus, tum Ecclesiasticis, tum Secularibus, dicatum.* The author the bishop of *Algarve*: *Autore Excellentissimo ac Reverendissimo D. Ignacio a S. Terezia Portucalensi, Excanonico Regulari S. Augustini Congregationis S. Cracis Colliabriensis, Archiepisco Goano, Primate Orientis, Indiani Status semel, et iterum, Seculari Ex-gubernatore: Postea vero Ecclesia Algarvensis Episcopo, et ejusdem Regni Armorum Gubernatore.* It is a performance calculated to free the votaries of Rome not only from the obligations of civil but of *divine* authority; furnishing such distinctions, evasions, and decisions, with regard to the most *FLAGITIOUS* and even *UNNATURAL* crimes, as amply instruct even how to commit them *salvi conscienti*! Is not this astonishing, in modern times, in a man of letters, and, as I have been informed, polite and converisible?

Tantum RELIGIO potuit suadere malorum!

“unto God the things which are God’s,” is no objection to “rendering unto Cæsar the things which are Cæsar’s].” The Dissenters are so far from setting up the supposed interests of religion, or, as you express it, “spiritual men,” or “spiritual causes,” against lawful magistracy, or the peace and good order of society, that they allow of the exemption of none from the authority of the civil magistrate; holding all to be equally under his jurisdiction; and that no plea of sacred character, or of religion and conscience, is to be admitted in bar to his procedure, in matters of a criminal, or merely civil nature. And as, in their opinion, it is his duty to *protect* all *good subjects* in the profession of their religious principles; so, without any regard to their religious principles or professions, he is to *punish* all *offenders* against the *peace of society*. Now, how is this “setting up an independent supremacy of their own, where spiritual men and spiritual causes are concerned?” If, as they say, all men are to judge for themselves, and act accordingly, in matters of faith and worship, and the salvation of their souls; if, in these respects, they are not to controul, usurp upon, and domineer over one another, and are at the same time to be *subject to the civil magistrate*; this appears to me to be so far from setting up an *imperium in imperio*, that it leaves no *imperium*, no supremacy, indeed, *no power at all*, in society, *but that of the civil magistrate*. These principles, therefore, can never issue in a distinct independent supremacy of those who profess them, whether *spiritual men* or others. The principles of the Papists, indeed, directly lead to and support this supremacy: the principles of the Dissenters are diametrically opposed to it.

AND as their principles are quite of another nature, another genius and complexion, than those of the Papists; so are they, than those of the enthusiasts whom you have mentioned. I know no Dissenter on earth who holds, that *dominion is founded in grace*, and that *the saint’s must rule the world*; or any principles which have the least tendency and aspect towards such a

conclusion.

conclusion. On the contrary, they all to a man assert, that religion is so far from vesting in its professors a title to *dominion*, that it is no exemption from *civil subjection*. It is in matters of conscience only, they apprehend, they are alone accountable to God; and that not so as to excuse thereby any criminal overt acts, inconsistent with the peace of society: *these*, the magistrate must punish, from whatever principle they proceed, from any or none, and whatever plea of that sort is offered in their favour. Some enthusiasts formerly, particularly those you have censured, made one composition of religion and politics; the Dissenters, on the contrary, keep them wholly distinct, as being of a different nature, and relating to different purposes, and different interests; the one to the soul, the other to the body; the one to the present world, the other to the future. These enthusiasts were strenuous assertors of the monarchy of King Jesus, that his kingdom was of this world: the Dissenters zealously maintain, in conformity with reason and scripture, that “ Christ’s kingdom is not of this world*,” and doth not at all interfere with the office of the magistrate; who, in their opinion, is supreme over all persons within his dominions, of whatever religion, of any or none. I will venture to affirm, that it is impossible to erect the system of these enthusiasts, as a super-structure, on the principles of the Dissenters, as a foundation. The principles of the latter are totally incompatible with the whole scheme of the former, and of all others, most effectually overturn and destroy it. In a word, their principles, with respect both to church authority and to civil government, are precisely the same which the late Bishop Hoadly advanced and supported in an unanswerable manner; doing thereby such service to the cause of true Protestantism, and of the royal succession in the House of Hanover, as will always be remembered with gratitude by the true friends of that august family, and of the liberty of their country.

I SHALL

* John xviii. 36.

I SHALL only add, in justice to Dr. Priestley, whom you call a willing critic, (I suppose, you mean one inclined to put not the most favourable construction upon your expressions) that, I believe, every Dissenter, I am sure, every one with whom I have conversed, who had read that page in your Commentaries, which contains a comparison between the principles and the conduct of the Papists and the Sectaries, understood you, in the most obnoxious passage of all, in the same sense in which he did; namely, as referring to the modern Dissenters; and were perhaps as much offended with it as he was: I refer to that clause, wherein you say, " As to the Papists, their tenets are undoubtedly calculated for the introduction of all slavery, both civil and religious; but it may with justice be questioned, whether the spirit, the doctrines, and the practice of the Sectaries ARE better calculated to make men good subjects*."

I SHALL not scruple to affirm, that there are no better subjects, and no better friends to the constitution of their country as a limited monarchy, defined and improved by the glorious Revolution, than the Protestant Dissenters†: they pray for the con-

H h tinuance

* Comment. vol. iv. p. 52.

† " The Dissenters are sincere well-wishers to the civil part of our present happy establishment; and they are to be esteemed and loved for it;" saith the late Abp. Secker, in his letter to Mr. Walpole concerning bishops in America, p. 24, 25. Dr. Burton, the Archbishop's panegyrist (in his *Commentariolus Thomæ Secker, &c.* p. 27.) hath given a different character of certain persons, whom he stiles, " *Dissentientium greges quidam* :" After mentioning the Archbishop's scheme of sending bishops to America, he adds: *fremunt tamen illico et tumultuantur Dissentientium greges quidam irritabiles et pervicaces*; *idem in Republica Civis seditionis in Ecclesia Principatum adepti, Tyranni intolerabiles*. Whether the author levels this invective against the Presbyterians and Independents in the colonies, or the Dissenters at home, I will not be positive. If he means the Americans, they perhaps would tell him, that he hath grossly misrepresented both their civil and their religious principles, and would excuse him on the score only of that noble privilege, which Atticus allows all rhetoricians:

Concessum

tinuance of the Protestant succession in the present illustrious royal family, and for the *salus regis et populi*, in the words, and with the fervour, with which father Paul prayed for the Republic of Venice in his dying moments: *ESTO PERPETUA!*

BUT I have done: you have promised to correct those passages in your next edition; and I have no doubt, you will make that correction in such a manner as will be entirely satisfactory*,

IN thus addressing you, Sir, I would not be thought to entertain a fondness for controversy. I know full well, how seldom it is, that controversies answer any valuable end. They often sour and imbitter men's minds, and give a keenness and acrimony to their tempers; besides engrossing a great deal of time

Concessum est rhetoribus ementiri in historiis, ut aliquid dicere possint argutius. Cicero de claris oratoribus, c. 11. But if he means the Dissenters, I am content to ascribe it solely to his total ignorance of their character; otherwise he would know, that ecclesiastical authority, and much more ecclesiastical tyranny, in the hands of either presbyters or bishops, is their entire aversion. As for sedition, that charge, I think, is unjust even against their ancestors the puritans; who, in general, were not a whit more seditious, or more enemies to limited monarchy, and lawful authority, than those great patriots of the church of England, who at that time opposed the designs of an arbitrary court, and the dangerous encroachments of prerogative upon civil liberty. And as to their descendants, the modern Dissenters, let his oracle the Archbishop be their compurgator; who had reason to know them better than his panegyrist, as he was not only born of dissenting parents, but received his education, together with the late excellent Bishop Butler, in one of their academies, under a tutor (one Mr. Jones, as he is called in the late review of his Grace's life and character, p. 2.) whose great learning and abilities would have been no little honour to either of our universities: Circumstances, by the way, which this gentleman, in his great ingenuity and liberality of sentiment, hath thought proper to pass over in silence; whether, because he imagined, they would be a disgrace to the Archbishop, or an honour to the Dissenters, or both, I pretend not to determine.

* The author hath left them out in the last edition of the *Commentaries*. A degree of candor, worthy not only of applause, but of imitation!

time and attention, which most men may employ to much better purposes. I am so convinced of this, that nothing should have engaged me to appear in the character of a polemical writer, even so far as I have now done, in laying before you, and the public, the preceding remarks, if I had not been fully persuaded, that some positions and sentiments which you have advanced, have an unfavourable aspect (and the more so as coming from an author of your distinguished reputation) on the glorious cause of religious liberty : a cause nearly connected with, and of great importance to, the interests of truth, and the present and future happiness of mankind.

Thus, Sir, have I freely, and I hope, inoffensively, pointed out some of the *supposed* blemishes in your otherwise excellent and elaborate work; which many, who have a great opinion both of the author and of his performance, wish to see corrected. And, I am persuaded, they will be so, as far as you shall be convinced they are *real* blemishes: Whether they are or not, must be left, Sir, to your consideration, and to the judgment of the impartial public.

I am,

with great respect, &c.

PHILIP FURNEAUX,



APPENDIX:

CONTAINING

AUTHENTIC COPIES

O F

The ARGUMENT of the late Honourable Mr. Justice FOSTER in the Court of the Judges Delegates,

AND O F

The SPEECH of the Right Honourable Lord MANSFIELD in the House of Lords, in the Cause between the City of London and the Dissenters.

A D V E R T I S E M E N T.

IT is proper the reader should be apprized, previous to the perusal of the following argument and speech, that in the year 1748, the Corporation of London made a by-law, with a view, as they alledged, of procuring fit and able persons to serve the office of sheriff of the said Corporation ; imposing for that end a fine of four hundred pounds and twenty marks upon every person who, being nominated by the Lord Mayor, declined standing the election of the Common-hall ; and six hundred pounds upon every one who, being elected by the Common-hall, refused to serve the office. Which fines they appropriated to defraying the expence of building the Mansion-house.

MANY Dissenters were nominated and elected to the said office, who were incapable of serving ; it having been enacted by the Corporation-act (13 Car. II. stat. 2. c. 1.) that no person should be elected into any Corporation-offices, who had not taken the sacrament i.e. the church of England within a year preceding the time of such election ; and several of them, accordingly, paid their fines, to the amount of above fifteen thousand pounds. Some at length refused to pay their fines, apprehending they could not be obliged, by law, to fine for not serving an office to which they were, by law, uneligible. The city, therefore, brought actions of debt against them in a court of their own, called the Sheriff's Court, for the recovery of those fines. After many delays the cause came to a hearing in the case of Allen Evans, Esq; and judgment was given for the Plaintiff in September 1757. The defendant Evans brought the cause before the Court of Hustings, another city-court, to which an appeal lay ; and the judgment was there affirmed by the Recorder in the year 1759. The Defendant then, by writ of error, brought the

the cause before the Court of Judges Delegates, called the Court of St. Martin's : the Delegates were Lord Chief Justice Willes, Lord Chief Baron Parker, Mr. Justice Foster, Mr. Justice Bathurst, and Mr. Justice Wilmot. Lord Chief Justice Willes dying before judgment given, the rest of the delegates delivered their opinions *seriatim*, July 5, 1762, and unanimously reversed the judgment of the Sheriff's Court and Court of Hustings. On this occasion the following excellent argument of Mr. Justice Foster was delivered. The Corporation then by writ of error brought the cause before the House of Lords, when all the Judges, who had not sat as delegates, except Mr. Justice Yates who was ill, gave their opinions *seriatim*, Feb. 3d and 4th, 1767, upon a question put to them by the House. After which Lord Mansfield in his place as a peer, made the justly-admired speech which is here published ; concluding it with moving, that the judgment be affirmed ; which was done immediately without any debate, or a dissentient voice.

THIS was a cause of great expectation ; it was interesting to the Dissenters not only in London, but in every Corporation in the kingdom ; since they might, any of them, follow the steps of the city of London ; make a by-law to fine those who refused to serve Corporation-offices, under pretence of procuring fit and able persons ; and then choose Dissenters who had not taken the sacrament at church within a year preceding the time of such election, to any number they thought proper ; who, provided the city of London had succeeded in this leading cause, would have had the alternative, of subjecting themselves to a prosecution and to heavy penalties, if they served the office under the incapacity incurred by the Corporation-act ; or of paying their fines, to any amount the Corporation should think fit to impose.

IN the argument upon this cause, the extent and influence of the Act of Toleration, and whether it abolished the crime as well as the penalties of nonconformity, came under consideration : which is directly in point to the subject of my first letter.

I HAVE

I HAVE had an opportunity of perusing copies, taken in court, of the arguments of Mr. Justice (now Lord Chief Justice) Wilmot, Mr. Justice Bathurst, and Lord Chief Baron Parker; who, together with Mr. Justice Foster, composed the Court of Judges Delegates. Their respective arguments contain very judicious and pertinent observations and cogent reasonings, in support of the unanimous judgment given for the Defendant; and they all assert the influence and operation of the Toleration-act in the extent in which I have pleaded for it, as removing the crime as well as penalties of nonconformity. Mr. Justice Wilmot says, " It hath taken away both the *reatum et poenam*;" and " that it is no greater offence in the Defendant not to have received the sacrament according to the rites of the church of England, than it is not to be worth fifteen thousand pounds;" the qualification for the office of sheriff. Mr. Justice Bathurst says, " The Defendant's disability was occasioned by a voluntary omission, but not default, unless it was his duty to receive the sacrament." And " if the Defendant is not by any law obliged to receive the sacrament annually, he is guilty of no default in omitting to do it. Here the Defendant, by bringing himself within the toleration-act, shews it was not his duty to receive the sacrament." And whereas it was objected, " That this averment of Mr. Evans, that he could not take the sacrament according to the rites of the church of England, could not avail him: that it could only be known to the Searcher of all hearts, and the contrary could not be proved;" Lord Chief Baron Parker replies, that " Lord Chief Justice Holt in Larwood's case was of a different opinion; the plea was disallowed for want of that averment. The contrary may be proved, by his having accepted a profitable office requiring that qualification, or by other circumstances, shewing that he really had no such scruples. But if no evidence can be given of that insincerity, he *ought to be, and is excused by law.*" But though these learned judges all agreed in the opinion concerning the toleration-act, that it abolished

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the crime of nonconformity, as well as the penalty ; yet none of them gave their reasons for it so fully as Mr. Justice Foster : on which account his argument is more apposite to my particular purpose than that of any other of the Judges Delegates. And besides arguing this point in a very convincing manner, he hath likewise given a masterly exposition of the 12th section of the Corporation-act, in which Lord Chief Baron Parker declared his concurrence with him : and on these two points the merits of the cause principally depended.

WHEN the Judges delivered their opinions in the House of Lords, they were naturally led, by the wording of the question which the House put to them on the motion of Lord Mansfield, into a particular consideration of the meaning of the Toleration-act ; and the substance of what was then said (togeth^r with some excellent observations and reasonings which were peculiar to himself) may be seen to very great advantage in the speech of that Noble Lord which is here presented to the world.

THERE is one remark which it may be proper to make, that whereas in Larwood's case, the Court of King's Bench would not admit his allegation that he was a Dissenter, because it was made in his rejoinder, and not in his plea ; so that his rejoinder was a departure from his plea ; and the Court could not take notice of the Toleration-act unless it was pleaded, because it was a *private* statute: one of the learned Judges in the House of Lords, observing upon this, declared his opinion, that the Court determined wrong in Larwood's case, the Toleration-act not being a *private*, but a *public* statute. And for this he assigned the the following reasons : that there is no distinction between a public and a private statute in point of authority, but only of notoriety and universality. Now the Dissenters were a body of people well known in the kingdom, and even mentioned in several acts of parliament, and had public statutes enacted against them before the Toleration-act, which were repealed by that act ; and therefore it should in all reason be considered as a public

lic act : Especially, as in reality it virtually affects all persons in the kingdom, setting them at liberty, and giving them a legal right to become Nonconformists, if they are so disposed. And the preamble to the act mentions another consideration as the design of the legislature in passing it, which is of the most public nature, and of universal influence: It saith, " Forasmuch as " some ease to scrupulous consciences in the exercise of religion, " may be an effectual means to unite their majesties protestant " subjects in interest and affection : Be it enacted," &c. Now is it possible to conceive, that an act, which related to a body of people at that time so well known as the Dissenters, which repealed several public statutes, which gives liberty of dissent to every one who chooses to avail himself of it ; and which was designed to unite all protestant subjects in interest and affection ; is it possible to conceive, that this can be a private act ? If so, by what criterion can we distinguish between private acts and public ones ? But to return :

THE authenticity of the copy, here published, of the argument of that upright and able lawyer, the late Mr. Justice Foster, will appear from the following letter of his worthy Nephew : and whatever be the defects of my own performance, to which that gentleman is very partial ; and of how little advantage soever the publication of it may be to the world, I reckon it no inconsiderable one to myself, that it hath procured me the acquaintance and friendship of Mr. Dodson.

APPENDIX. NO. I.

A Letter from MICHAEL DODSON, Esq; to the AUTHOR.

REVEREND SIR,

I ADMIRE the letters which you have addressed to the Honourable Gentleman to whom the world is indebted for the celebrated Commentaries on the laws of England, and think that you have very clearly proved in the first letter, that such of the Dissenters as comply with the terms of the toleration-act, are not in the eye of the law guilty of any crime by reason of their nonconformity. But though the observations which you have made for this purpose seem to be abundantly sufficient, yet I presume that it will be agreeable to you to see the argument of the late Mr. Justice Foster, in the cause between the city of London and the Dissenters, as delivered by him at Guildhall in July 1762, when the judges delegates gave judgment for Mr. Evans the plaintiff in error; and I now send it you exactly copied from his own notes, at the same time giving my consent to the publication of it in an appendix to your letters.

I am, with great respect,

Reverend Sir,

Your most obedient humble servant,

Clifford's Inn,
Aug. 25, 1770.

MICHAEL DODSON.

MR. JUSTICE FOSTER'S *Argument in the Case of ALLEN EVANS, Esq; against Sir THOMAS HARRISON, Chamberlain of London.*

THE merits of the case will turn on the Corporation and Toleration-acts taken together. One works a disability on the part of the plaintiff in error; the other shews that this disability doth not arise from any criminal neglect in him. The Corporation-act * prohibits the election of Nonconformists; the Toleration-act † renders nonconformity no longer a crime.

THE intention of the legislature in framing the Corporation-act was to exclude all Nonconformists from corporation offices. The preamble after a short mention of the late troubles goes on and faith, “ To the end that the succession in such corporations may be most probably perpetuated in the hands of persons well-affected to his majesty and the established government—and for the preservation of the public peace both in church and state, Be it enacted,” &c.

THIS exclusion was to be effected two ways. The first was by removing all Nonconformists who were then in office or should come into office before the 25th of March 1663. The second, by providing against the admission of them for the future.

WITH regard to those then in office commissioners are appointed with extraordinary powers, powers new and unknown to the constitution, which nothing but the most urgent necessity, real or imaginary, could have justified. For they were impowered among other things, at their will and pleasure to remove all corporation officers *if they should deem it expedient for the public*

* 13 Car. II. stat. 2. c. 1.

† 1 W. & M. sess. 1. c. 18.

lic safety, and at their will and pleasure to fill up all vacancies occasioned by such removals or otherwise.

This commission expired on the 25th of March 1663. And it is observable, that during this commission no mention is made of the Sacramental Qualification. The well-known zeal of the commissioners, men picked and chosen for the purpose, with regard to the exclusion of Nonconformists who had been rendered very odious, made an express provision for that purpose needless as to them.

BUT when elections were to return into their old channel, subject only to charter and custom, it was thought necessary to put electors, whose zeal in the cause might by time and a change of circumstances be abated—it was thought necessary to put them under a new restraint; and to make this restraint perpetual. This is done by the 12th section of the act: “ Provided also and “ be it enacted, that from and after the expiration of the said “ commission, no person or persons shall for ever hereafter be “ placed, elected or chosen in or to any the offices or places a- “ foresaid, that shall not have within one year next before such “ election or choice taken the sacrament of the Lord’s Supper “ according to the rites of the church of England; and that e- “ very such person and persons so placed, elected or chosen, shall “ likewise take the aforesaid three oaths, and subscribe the said “ declaration at the same time when the oath for the due exe- “ cution of the said places and offices respectively shall be ad- “ mitted; and in default hereof, every such placing, election “ and choice is hereby enacted and declared to be void.”

THIS clause consists of two Branches independent and unconnected with each other. The first regards the persons having the right and power of election and nomination to corporation-offices: The second, the candidates alone.

THE first is, in my opinion, prohibitory on the electors; it lays a restraint upon them in the exercise of their ancient right

and discretionary power in the matter of the election, and confines them to persons conforming to the establishment in the manner prescribed by the act. No person not previously qualified as the act directs, shall for ever hereafter be elected. What is this but saying, That no corporation having the right of election shall for ever hereafter elect any person not so previously qualified?

THE second Branch of the clause regards only the candidate, and upon a supposition that he may have been eligible and actually elected, requires something further to be done by him, the taking and subscribing the three oaths and declaration; and in default hereof declares the election void.

I THEREFORE do not find my opinion on this branch of the statute, but on that which prohibits the election of persons not previously qualified. For in true Grammar and plain construction, what is the meaning of the words, *in default hereof the election shall be void?* In default of what? Plainly in default of something required by the act to be done by the candidate after his election; not in default of what this act doth not require of him.

I SAY what *this* act doth not require; for though it should be admitted that the Rubrick did injoin conformity in the instances therein mentioned, yet still in the construction of the words, *in default hereof*, as they stand in this clause, we must confine ourselves to those duties which *this* act alone doth require.

I RETURN now to the first Branch of the clause. If it be prohibitory on the electors, as I think it is, the consequence will be that if they having due notice of the incapacity of the candidate, will proceed to elect a person declared by the statute not eligible, this shadow of an election will be a mere nullity; as being made in contravention to the statute, a contravention on the part of the electors wilful, open and undisguised.

IN the present case it must be admitted, that the electors had due notice of the incapacity of the Defendant in the action, since he in his plea avers it, and the Plaintiff hath not put it in issue.

THIS being so, it will, I think, be impossible to maintain that a right of action can accrue to the Corporation from a proceeding prohibited by the statute, and consequently null and void from the beginning.

IN the case of the Mayor of Guildford against Clarke * the Court held, " That to make a default in the Defendant there must have been an election antecedent; and that the election of such an one as the Defendant *is absolutely prohibited by the statute.*"

THUS the case stands with regard to the Corporation.

ON the other hand, what is the case of the Defendant? he is now called upon under a penalty to usurp an office upon the Crown, which usurpation will subject him to a criminal prosecution and to a heavy punishment. Strange dilemma this! You shall, saith the Plaintiff in the action, usurp upon the crown, or forfeit the penalties of the By-law. Can the By-law purge the usurpation? It cannot. And can it at the same time oblige the Defendant, conscious of his own incapacity, and apprized of the danger of the usurpation, to venture on it? I think not,

IT hath been said, that all corporations have a right to the service of their members. They certainly have this right under proper limitations, but still it is a right subject to the controul of the legislature, and in the matter of the election they must submit to such regulations and restraints as the statute hath laid on them.

IT hath been said, Shall persons who live in open contempt of all Gospel institutions shelter themselves under this act? It is sufficient

* 2 Vent. 247, 248.

sufficient at present to say, that their case was not in the contemplation of the legislature at the time this act was made, and consequently the Act cannot be extended to them. The Act was plainly levelled at persons of a quite different character; I mean the Protestant Nonconformists.

BESIDES, the Defendant doth not take shelter under the idle excuse which the objection puts into the mouths of Debauchees and Unbelievers; but having pleaded the Toleration-act, which will be considered in its proper place, he avers, that he doth not live in the neglect of Gospel Ordinances, though he entertains some scruples touching the mode of administration in the Established Church; and he hopes the Act of Toleration hath dispensed with conformity in that respect.

A GREAT deal hath been said touching the distinction between Acts and Proceedings, void in themselves and only voidable; and touching the construction of Statutes declaring certain proceedings void.

THE answer I shall at present give to what hath been said on that head is, that the point now in question will not turn on that branch of the statute which declares the election void, but upon that which absolutely prohibits it, and consequently renders it a mere nullity. If I am right in this, nothing that hath been urged upon the head of *void* and *voidable* will be applicable to the present case.

IT hath been said, that the construction now contended for is over-partial to Diluters, it excuseth them from offices of Burden. But doth it not at the same time exclude them from all offices attended with Honour and profit? And it would sound extremely harsh to say, that the same law which, for the reasons given in the preamble, excludes them from the one, *as persons unworthy of public trust*, hath still left them liable to the other, be the trust that attends the office what it may. The

Shrievalty

Shrievalty is indeed an office of burden, but we all know that it is likewise an office of great importance and signal trust.

IT was said in Larwood's case*, and I believe it had great weight with those Judges who thought him liable to serve the office, that no man can by his own plea disable himself, or excuse one fault by another.

IT is sufficient on the present occasion to say, that Larwood's case totally and substantially differs from the present. Larwood had not properly pleaded the Toleration-act, and therefore could not take advantage of it. The present Defendant hath properly pleaded it, and shewn himself entitled to the benefit of it.

AND he doth not plead it in order to excuse one fault by another, but in order to shew that the Rubrick, which requires all persons to communicate with the Established Church three times at least in the year, is not now obligatory on him. The Toleration-Act, he saith, hath taken away the force and effect of the Rubbrick, with regard to him. Whether it hath or hath not done this remains to be considered. And I am clearly of opinion with my Brothers who have spoken before me, that it hath.

THIS opinion I ground not barely on some particular branches of the Act, but likewise on the Spirit and general Frame and Tenour of it.

IT is not to be considered merely as an act of connivance and exemption from the penalties of former laws; it doth, in my opinion, declare the public worship among Protestant Dissenters to be warranted by law, and intitled to the public Protection.

IT no less than four times, upon different occasions, speaks of
K k the

* Reported in 4 Mod. 269. 12 Mod. 67. 1 Ld. Raym. 29. Salk. 167, and other books.

the religious worship practised among them as a mode of worship *permitted and allowed* by that act. What is this but saying, that it was warranted by Law? The magistrate may sometimes connive where he cannot punish or reform? but what the legislature permits, allows and takes under its protection, ceaseth from that moment to be an offence.

WHEN it enforceth former laws made for obliging all persons to resort to divine service on the Lord's Day, the attendance upon divine worship among the Dissenters is made equivalent to their attendance at the Churches established by Law.

WITH regard to the special penalties inflicted by the Act upon persons maliciously and contemptuously disturbing public worship, the places for religious worship among Protestant Dissenters are expressly put upon a level with Cathedrals, Parish-churches, and Chapels. I say, with regard to the special penalties of this Act, they are put upon a level. For though persons disturbing the public worship in the Established Church may be liable to prosecutions of another kind, yet with regard to the penalties inflicted by this act, dissenting meeting-houses and parish churches stand upon the same foot.

And persons officiating as Teachers or Preachers in their congregations are exempted from serving on juries and executing public offices in as full a manner, and I presume upon the same principles, as the established Clergy are exempted by the common law.

BESIDES, let the Toleration-act be considered barely as exempting Protestant Dissenters from the penalties of all former laws inflicted *singly* on account of their nonconformity. In this light at least it must be considered. And considered in this light it will be very difficult to conceive that the Legislature intended to leave them still open to ecclesiastical censures for not complying with this Rubrick.

THUS much I thought proper to say touching the general frame and apparent intention of the Toleration-act. But the point will not stand upon inferences and conclusions drawn from the spirit and frame of the act. It expressly provides that they shall not be prosecuted in any Ecclesiastical Court for or by reason of their nonconformity to the Church of England.

IT may be easily shewn that all prosecutions founded on the Rubrick were carried on in the ecclesiastical courts, and not elsewhere: consequently a person intitled to the benefit of this Act, is not now obliged to conform to the Rubrick.

I CONCLUDE therefore that the Corporation-Act being prohibitory on the Electors, every election made in contravention to it with notice of the incapacity of the Candidate, and of his legal excuse founded on the Toleration-act, is a mere nullity. And that the Act having dispensed with the Defendant's conformity to the Rubrick, the judgment against him must be reversed.

A P P E N D I X. No. 2.

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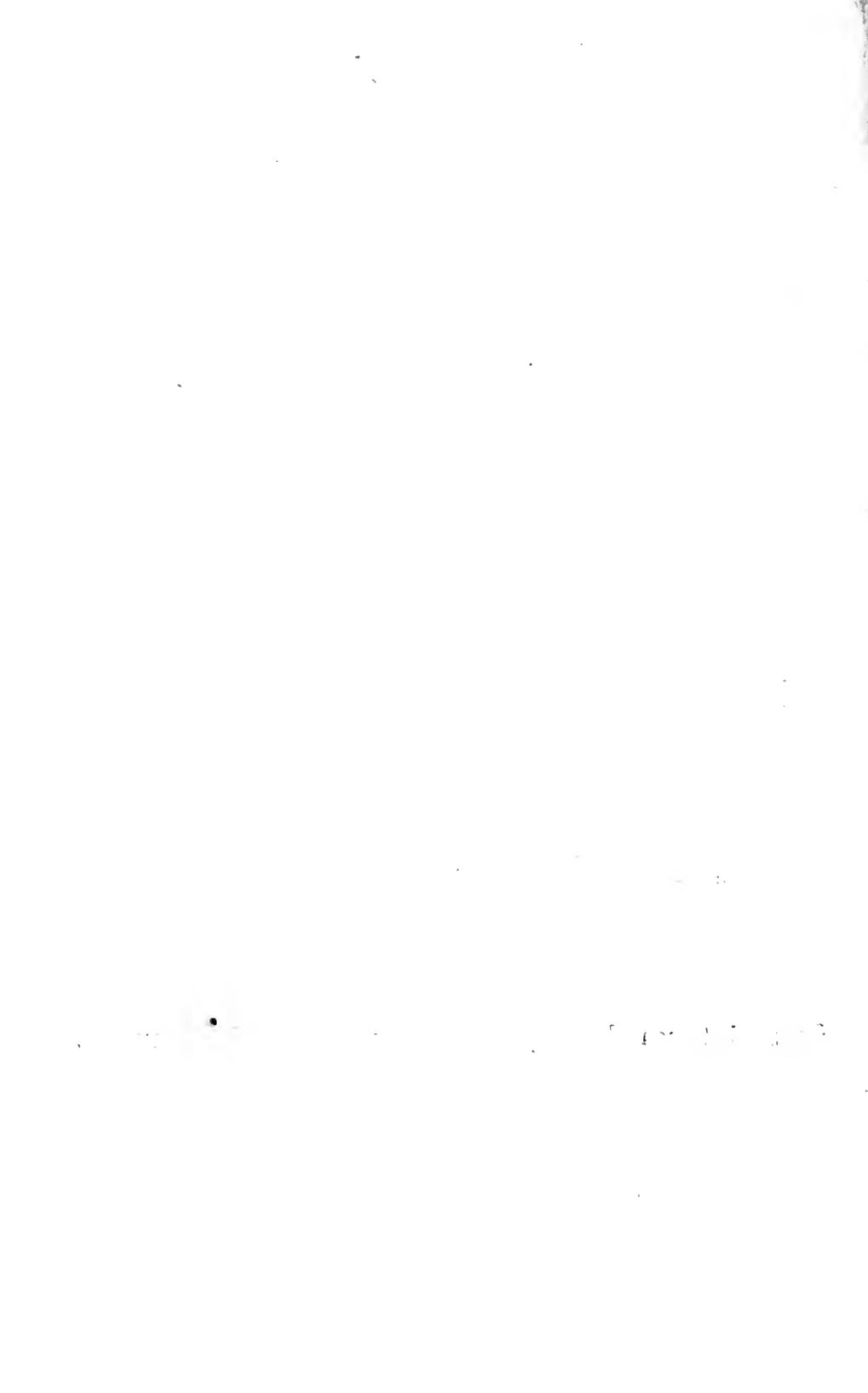
LORD MANSFIELD,

IN THE

House of Lords, Feb. 4, 1767.

IN THE

CAUSE between the City of LONDON and the DISSENTERS;



It is proper, as an Introduction to the following Speech, to prefix the Question which the House of Lords put to the Judges; as also their Opinions upon it: A Question, which the Noble Lord who moved it hath worded with such precision, that it is hardly possible the point on which the Cause turns, should be mistaken on any future occasion.

EXTRACT from the JOURNALS of the HOUSE OF LORDS.

Die Jovis 22 Januarii 1767.

Chamberlain of London. against
E V A N S. } COUNCIL (according to order) were called in to be further heard in the cause upon a writ of error brought into this House, wherein the Chamberlain of the City of London is Plaintiff, and Allen Evans, Esq; Defendant; and the council for the Defendant having been heard; as also one council for the Plaintiff by way of reply; the council were directed to withdraw.

AND it being proposed, that the Judges be directed to deliver their opinions upon the following Question:

Q. WHETHER upon the facts admitted by the pleadings in this Cause, the Defendant is at liberty, or should be allowed to object to the validity of his election on account of his not having taken the sacrament according to the rites of the church of England within a year before, in bar of this action?

THE same was agreed to, and the said Question was accordingly put to the Judges.

WHEREUPON the Judges desiring some time might be allowed them for that purpose;

ORDERED,

ORDERED,

THAT the further hearing of the said Cause be adjourned to Tuesday next; and that the Judges do then attend to deliver their opinions upon the said Question.

Die Martis 27 Januarii 1767.

THE order of the day being read for the further hearing of the Cause wherein the Chamberlain of the city of London is Plaintiff, and Allen Evans, Esq; is Defendant, and for the Judges to deliver their opinions upon the Question proposed to them on Thursday last; the Lord Chancellor acquainted the House, That the Judges differed in their opinions, and that they desired, that further time might be allowed them for giving their opinions upon the said Question.

ORDERED,

THAT the further hearing of the said Cause be adjourned to this day sevennight; and that the Judges do then attend to deliver their opinions upon the said Question.

Die Martis 3 Februarii 1767.

THE order of the day being read for the further hearing of the Cause upon the writ of error, wherein the Chamberlain of the city of London is Plaintiff, and Allen Evans, Esq; is Defendant, and for the Judges to deliver their opinions upon the Question proposed to them on Thursday the 22d day of January last; the Lord Chancellor acquainted the House, That the Judges differed in their opinions; and thereupon they were directed to deliver their opinions *seriatim*, with their reasons.

ACCORDINGLY,

Mr. Justice Hewitt was heard, and gave his reasons, and concluded with his opinion, that the Defendant is at liberty, and should be allowed to object to the validity of his election, on account

account of his not having taken the sacrament according to the rites of the church of England within a year before, in bar of this action.

MR. Justice Aston heard, and was of the same opinion, and gave his reasons.

MR. Baron Perrott heard, and gave his reasons, and concluded with his opinion, That the Defendant is not at liberty, nor ought to be allowed to object to the validity of his election on account of his not having taken the sacrament according to the rites of the church of England within a year before, in bar of this action.

MR. Justice Gould heard, and was of the same opinion as Mr. Justice Aston, and gave his reasons.

ORDERED,

THAT the further consideration of the said Cause be adjourned till to-morrow; and that the Judges do then attend.

Die Mercurii 4 Februarii 1767.

THE order of the Day being read for the further hearing of the Cause upon the writ of error wherein the Chamberlain of the city of London is Plaintiff, and Allen Evans, Esq; is Defendant; and for the Judges to attend.

MR. Baron Adams was heard, and gave his reasons, and concluded with his opinion, That the Defendant is at liberty, &c.

MR. Baron Smythe heard, and was of the same opinion, and gave his reasons.

MR. Justice Clive heard, and was of the same opinion, and gave his reasons.—Thus far the journals.

As soon as the Judges had given their opinions, Lord Mansfield made the following speech.

Lord MANSFIELD's Speech in the House of Lords, in the Case of the Chamberlain of London against ALLEN EVANS, Esq;

MY LORDS,

AS I made the motion for taking the opinion of the learned Judges, and proposed the question your Lordships have been pleased to put to them; it may be expected, that I should make some further motion, in consequence of the opinions they have delivered.

IN moving for the opinion of the Judges, I had two views: The first was, that the House might have the benefit of their assistance, in forming a right judgment in this cause now before us, upon this writ of error: The next was, that, the question being fully discussed, the grounds of our judgment, together with their exceptions, limitations, and restrictions, might be clearly and certainly known; as a rule to be followed hereafter, in all future cases of the like nature: And this determined me as to the manner of wording the question, " How far the Defendant might, in the present case, be allowed to plead his disability in bar of the action brought against him?"

THE question, thus worded, shews the point upon which your Lordships thought this cause turned; and the answer necessarily fixes a criterion, under what circumstances and by what persons such a disability may be pleaded, as an exemption from the penalty inflicted by this by-law, upon those who decline taking upon them the office of Sheriff.

IN every view in which I have been able to consider this matter, I think this action cannot be supported.

IF they rely on the Corporation-act; by the literal and express provision of that act no person can be elected, who hath not

not within a year taken the sacrament in the Church of England : the Defendant hath not taken the sacrament within a year : he is not therefore elected. Here they fail.

If they ground it on the general design of the legislature in passing the Corporation-act ; the design was to exclude the Dissenters from office, and disable them from serving. For in those times, when a spirit of intolerance prevailed, and severe measures were pursued, the Dissenters were reputed and treated as persons ill-affected and dangerous to the Government : The Defendant therefore, a Dissenter, and in the eye of this law a person dangerous and ill-affected, is excluded from office, and disabled from serving. Here they fail.

If they ground the action on their own by-law ; since that by-law was professedly made to procure fit and able persons to serve the office, and the Defendant is not fit and able ; being expressly disabled by Statute-law ; here too they fail.

If they ground it on his disability being owing to a neglect of taking the sacrament at church, when he ought to have done it ; the Toleration-act having freed the Dissenters from all obligation to take the sacrament at church, the Defendant is guilty of no neglect, no criminal neglect. Here therefore they fail.

These points, my Lords, will appear clear and plain.

The Corporation-act, pleaded by the Defendant as rendering him uneligible to this office, and incapable of taking it upon him, was most certainly intended by the legislature to prohibit the persons therein described being elected to any corporation-offices, and to disable them from taking such offices upon them. The act had two parts : First it appointed a commission for turning out all that were at that time in office, who would not comply with what was required as the condition of their continuance therein, and even gave a power to turn them out though they should comply : and then it further enacted,

that from the termination of that commission no person hereafter who had not taken the sacrament according to the rites of the Church of England within one year preceding the time of such election, should be placed, chosen, or elected, into any office of or belonging to the government of any corporation: and this was done, as it was expressly declared in the preamble to the act, in order to perpetuate the succession in corporations in the hands of persons well-affected to the government in church and state.

IT was not their design, as hath been said*, “ to bring such persons into corporations by inducing them to take the sacrament in the church of England;” the legislature did not mean to tempt persons who were ill-affected to the government, occasionally to conform: It was not, I say, their design to bring them in; they could not trust them, lest they should use the power of their offices to distress and annoy the state. And the reason is alledged in the act itself: it was because there were “evil spirits” amongst them; and they were afraid of evil spirits and determined to keep them out: And therefore they put it out of the power of electors to choose such persons, and out of their power to serve; and accordingly prescribed a mark or character, laid down a description whereby they should be known and distinguished by their conduct previous to such election; instead of appointing a condition of their serving the office, resulting from their future conduct, or some consequent action to be performed by them: they declared such persons incapable of being chosen, as had not taken the sacrament in the church within a year before such election; and without this mark of their affection to the church, they could not be in office, and there could be no election.

BUT as the law then stood, no man could have pleaded this disability, resulting from the corporation-act, in bar of such an action as is now brought against the Defendant; because this disability

* By Mr. Baron Perrott.

disability was owing to what was then in the eye of the law a crime; every man being required by the canon-law, received and confirmed by statute-law, to take the sacrament in the church at least once a year: The law would not permit a man to say, that he had not taken the sacrament in the Church of England; and he could not be allowed to plead it in bar of any action brought against him.

BUT the case is quite altered since the act of Toleration: It is now no crime for a man, who is within the description of that Act, to say he is a Dissenter; nor is it any crime for him not to take the sacrament according to the rites of the church of England: Nay, the crime is, if he does it contrary to the dictates of his own conscience.

IF it is a crime not to take the sacrament at church, it must be a crime by some Law; which must be either Common or Statute-law, the Canon-law inforcing it depending wholly upon the Statute-law. Now the Statute-law is repealed as to persons capable of pleading that they are so and so qualified; and therefore the Canon-law is repealed with regard to those persons. If it is a crime by Common-law, it must be so, either by Usage or Principle. There is no usage or custom independent of positive law, which makes Nonconformity a crime. The eternal principles of Natural Religion are part of the Common-law: The essential principles of Revealed Religion are part of the Common-law; so that any person reviling, subverting or ridiculing them, may be prosecuted at Common-law. But it cannot be shewn from the principles of Natural or Revealed Religion, that, independent of positive law, temporal punishments ought to be inflicted for mere opinions with respect to particular modes of worship.

PERSECUTION for a sincere, though erroneous conscience, is not to be deduced from reason or the fitness of things; it can only stand upon positive law.

It hath been said*, that " the Toleration-act only amounts to an exemption of Protestant Dissenters from the penalties of certain laws therein particularly mentioned, and to nothing more ; that if it had been intended to bear, and to have any operation upon the Corporation-act, the Corporation-act ought to have been mentioned therein ; and there ought to have been some enacting clause, exempting Dissenters from prosecution in consequence of this act, and enabling them to plead their not having received the sacrament according to the rites of the Church of England, in bar of such action." But this is much too limited and narrow a conception of the Toleration-act : which amounts consequentially to a great deal more than this ; and it hath consequentially an influence and operation upon the Corporation-act in particular. The Toleration-act renders that which was illegal before, now legal ; the Dissenters way of worship is permitted and allowed by this act ; it is not only exempted from punishment, but rendered innocent and lawful ; it is established : it is put under the protection, and is not merely under the connivance, of the law. In case those who are appointed by law to register Dissenting places of worship, refuse on any pretence to do it, we must, upon application, send a Mandamus to compel them.

Now there cannot be a plainer position, than that the law protects nothing, in that very respect in which it is in the eye of the law, at the same time, a crime. Dissenters within the description of the Toleration-act, are restored to a legal consideration and capacity ; and an hundred consequences will from thence follow, which are not mentioned in the Act. For instance, previous to the Toleration-act, it was unlawful to devise any legacy for the support of Dissenting Congregations, or for the benefit of Dissenting Ministers ; for the Law knew no such assemblies, and no such persons ; and such a devise was absolutely

* Mr. Baron Perrot.

solutely void, being left to what the law called superstitious purposes. But will it be said in any Court in England, that such a devise is not a good and valid one now? And yet there is nothing said of this in the Toleration-act. By that Act the Dissenters are freed, not only from the pains and penalties of the laws therein particularly specified, but from all ecclesiastical censures, and from all penalty and punishment whatsoever on account of their Nonconformity; which is allowed and protected by this act, and is therefore in the eye of the law no longer a crime. Now if the Defendant may say he is a Dissenter; if the Law doth not stop his mouth; if he may declare, that he hath not taken the sacrament according to the rites of the Church of England without being considered as criminal; if, I say, his mouth is not stopped by the Law, he may then plead his not having taken the sacrament according to the rites of the Church of England, in bar of this action. It is such a disability as doth not leave him liable to any action, or to any penalty or punishment whatsoever.

IT is indeed said * to be “ a maxim in law, That a man shall “ not be allowed to disable himself.” But when this maxim is applied to the present case, it is laid down in too large a sense; I say, when it is extended to comprehend a legal disability, it is taken in too great a latitude. What! shall not a man be allowed to plead, that he is not fit and able? These words are inserted in the By-law, as the ground of making it; and in the Plaintiff’s declaration as the ground of his action against the Defendant: it is alledged, that the Defendant was fit and able, and that he refused to serve not having a reasonable excuse. It is certain, and it is hereby in effect admitted, that if he is not fit and able, and that if he hath a reasonable excuse, he may plead it in bar of this action. Surely he may plead, that he is not worth fifteen thousand pounds, provided that was really the case, as a circumstance that would render him not fit and able. And if the law allows him to say, that he hath not taken the sacrament according to the rites of the Church of England,

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* Mr. Baron Perrot.

being within the description of the Toleration-act; he may plead that likewise, to shew that he is not fit and able: It is a reasonable, it is a lawful excuse.

My Lords, the meaning of this maxim, “ That a man shall ‘‘ not disable himself,” is solely this, That a man shall not disable himself by his own wilful crime: And such a disability the law will not allow him to plead. If a man contracts to sell an estate to any person upon certain terms at such a time, and in the mean time he sells it to another; he shall not be allowed to say, Sir, I cannot fulfil my contract; it is out of my power; I have sold my estate to another. Such a plea would be no bar to an action, because the act of his selling it to another is the very breach of contract. So likewise a man, who hath promised marriage to one lady, and afterwards marries another, cannot plead in bar of a prosecution from the first lady, that he is already married; because his marrying the second lady is the very breach of promise to the first. A man shall not be allowed to plead, that he was drunk, in bar of a criminal prosecution, though perhaps he was at the time as incapable of the exercise of reason as if he had been insane; because his drunkenness was itself a crime; he shall not be allowed to excuse one crime by another. The Roman soldier, who cut off his thumbs, was not suffered to plead his disability for the service, to procure his dismission with impunity; because his incapacity was designedly brought on him by his own wilful fault. And I am glad to observe so good an agreement among the Judges upon this point, who have stated it with great precision and clearness.

WHEN it was said * therefore, That “ a man cannot plead ‘‘ his crime, in excuse for not doing what he is by law required ‘‘ to do;” it only amounts to this, That he cannot plead in excuse what, when pleaded, is no excuse: but there is not in this the shadow of an objection to his pleading what is an excuse, pleading a legal disqualification. If he is nominated to be a

Justice

* Mr. Baron Perrott.

Justice of the Peace, he may say, I cannot be a Justice of Peace, for I have not an hundred pounds a year. In like manner a Dif- fenter may plead, I have not qualified, and I cannot qualify, and am not obliged to qualify; and you have no right to fine me for not serving.

IT hath been said*, That “ the King hath a right to the ser-
“ vice of all his subjects.” And this assertion is very true, pro-
vided it be properly qualified. For surely, against the operati-
on of this general right in particular cases, a man may plead a
Natural or Civil disability. May not a man plead, that he was
upon the high seas? May not idiocy or lunacy be pleaded?
which are Natural disabilities: Or a judgment of a court of law?
and much more, a judgment of Parliament? which are Civil
disabilities.

IT hath been said † to be “ a maxim, that no man can plead
“ his being a lunatic, to avoid a deed executed, or excuse an
“ act done, at that time; because,” it is said, “ if he was a lu-
“ natic, he could not remember any action he did during the
“ period of his insanity.” And this was doctrine formerly laid
down by some Judges; but I am glad to find, that of late it hath
been generally exploded; for the reason assigned for it is, in my
opinion, wholly insufficient to support it; because, though he
could not remember what passed during his insanity, yet he
might justly say, If he ever executed such a deed, or did such
an action, it must have been during his confinement or lunacy;
for he did not do it either before or since that time.

As to the case, in which a man’s plea of insanity was actually
set aside; it was nothing more than this: It was when they
pleaded *ore tenus*; the man pleaded that he was at the time out
of his sences. It was replied, How do you know that you was
out of your sences? No man that is so, knows himself to be so.
And according his plea was upon this quibble set aside; not be-

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cause

* Mr. Baron Perrot.

† Mr. Baron Perrot.

cause it was not a valid one, if he was out of his sences; but because they concluded, he was not out of his sences. If he had alledged, that he was at that time confined, being apprehended to be out of his sences; no advantage could have been taken of his manner of expressing himself; and his plea must have been allowed to be good.

As to Larwood's case; he was not allowed the benefit of the Toleration-act, because he did not plead it. If he had insisted on his right to the benefit of it in his plea, the judgment must have been different. His inserting it in his replication was not allowed, not because it was not an allegation that would have excused him, if it had been originally taken notice of in his plea; but because its being only mentioned afterwards was a departure from his plea.

IN the case of the Mayor of Guildford, the Toleration-act was pleaded, the plea was allowed good, the disability being esteemed a lawful one; and the judgment was right.

AND here the Defendant hath likewise insisted on his right to the benefit of the Toleration-act in his plea; he faith he is bona fide a Dissenter, within the description of the Toleration-act; that he hath taken the oaths and subscribed the declaration required by that Act to shew that he is not a Popish Recusant; that he hath never received the sacrament according to the rites of the Church of England, and that he cannot in conscience do it; and that for more than fifty years past he hath not been present at Church at the celebration of the established worship; but hath constantly received the sacrament, and attended divine service, among the Protestant Dissenters. And these facts are not denied by the Plaintiff: though they might easily have been traversed, and it was incumbent upon them to have done it, if they had not known they should certainly fail in it. There can be no doubt therefore, that the Defendant is a Dissenter, an honest conscientious Dissenter; and no conscientious Dissenter can take the sacrament at church; the Defendant faith he can-
not

not do it, and he is not obliged to do it. And as this is the case, as the Law allows him to say this, as it hath not stopped his mouth ; the plea which he makes is a lawful plea, his disability being through no crime or fault of his own ; I say, he is disabled by Act of Parliament, without the concurrence or intervention of any fault or crime of his own ; and therefore he may plead this disability in bar of the present action.

THE case of “*Athiests and Infidels*”* is out of the present question ; they come not within the description of the Toleration-act. And as this is the sole point to be enquired into, in all cases of the like nature with that of the Defendant, who here pleads the Toleration-act ; Is the man bona fide a *Diffenter* within the description of that Act ; If not, he cannot plead his disability in consequence of his not having taken the sacrament in the church of England : if he is, he may lawfully and with effect plead it, in bar of such an action. And the question, on which this distinction is grounded, must be tried by a jury.

IT hath been said †, that “*this being a matter between God and a man’s own conscience, it cannot come under the cognizance of a jury.*” But certainly it may : and though God alone is the absolute judge of a man’s religious profession, and of his conscience ; yet there are some marks even of sincerity ; among which there is none more certain than consistency. Surely a man’s sincerity may be judged of by overt-acts : It is a just and excellent maxim, which will hold good in this as in all other cases, “*By their fruits ye shall know them.*” Do they—I do not say go to Meeting now and then—but do they frequent the Meeting-house ? Do they join generally and statedly, in divine worship with dissenting congregations ? Whether they do or not, may be ascertained by their neighbours, and by those who frequent the same places of worship. In case a man hath occasionally conformed for the sake of places of trust and profit ; in that case I imagine, a jury would not hesitate in their verdict. If a man then alledges he is a *Diffenter*, and claims

the protection and advantages of the Toleration-act; a jury may justly find, that he is not a Dissenter within the description of the Toleration-act, so far as to render his disability a lawful one: If he takes the sacrament for his interest, the jury may conclude, that his scruple of conscience is a false pretence when set up to avoid a burthen.

THE Defendant in the present cause pleads, that he is a Dissenter within the description of the Toleration-act; that he hath not taken the sacrament in the Church of England within one year preceding the time of his supposed election, nor ever in his whole life; and that he cannot in conscience do it.

CONSCIENCE is not controllable by human laws, nor amenable to human tribunals. Persecution, or attempts to force conscience, will never produce conviction; and are only calculated to make hypocrites, or—martyrs.

MY LORDS, there never was a single instance from the Saxon times down to our own, in which a man was ever punished for erroneous opinions concerning rites or modes of worship, but upon some positive law. The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions: For Atheism, Blasphemy, and reviling the Christian Religion, there have been instances of persons prosecuted and punished upon the common law; but bare Nonconformity is no sin by the common law: and all positive laws inflicting any pains or penalties for Nonconformity to the established rites and modes, are repealed by the act of Toleration; and Dissenters are thereby exempted from all ecclesiastical censures.

WHAT bloodshed and confusion have been occasioned from the reign of Henry the Fourth, when the first penal statutes were enacted, down to the Revolution in this kingdom, by laws made to force conscience! There is nothing certainly more unreasonable, more inconsistent with the rights of human nature, more contrary to the spirit and precepts of the Christian Religion,

on, more iniquitous and unjust, more impolitic, than Persecution. It is against Natural Religion, Revealed Religion, and sound Policy.

S A D experience, and a large mind, taught that great man the President De Thou, this doctrine: let any man read the many admirable things which, though a Papist, he hath dared to advance upon the subject, in the dedication of his history to Harry the Fourth of France (which I never read without rapture); and he will be fully convinced, not only how cruel, but how impolitic, it is to persecute for religious opinions. I am sorry, that of late his countrymen have begun to open their eyes, see their error, and adopt his sentiments: I should not have broke my heart, (I hope I may say so without breach of christian charity), if France had continued to cherish the Jesuits, and to persecute the Huguenots. There was no occasion to revoke the Edict of Nants; the Jesuits needed only to have advised a plan similar to what is contended for, in the present case: Make a law to render them incapable of office; make another, to punish them for not serving. If they accept, punish them (for it is admitted on all hands, that the Defendant in the cause before your Lordships is prosecutable for taking the office upon him): If they accept, punish them; if they refuse, punish them; if they say, yes, punish them; if they say, no, punish them. My Lords, this is a most exquisite dilemma, from which there is no escaping; it is a trap a man cannot get out of; it is as bad persecution as the bed of Procrustes: If they are too short, stretch them; if they are too long, lop them. Small would have been their consolation to have been gravely told, The Edict of Nants is kept inviolable; you have the full benefit of that act of Toleration, you may take the sacrament in your own way with impunity; you are not compelled to go to Mass. Was this case but told in the City of London as of a proceeding in France, how would they exclaim against the jesuitical distinction! and yet in truth it comes from themselves: the Jesuits never thought

of it: when they meant to persecute, their act of Toleration, the Edict of Nants, was repealed.

THIS By-law, by which the Dissenters are to be reduced to this wretched dilemma, is a By-law of the City, a local corporation, contrary to an Act of Parliament, which is the law of the land; a modern By-law, of very modern date, made long since the Corporation-act, long since the Toleration-act, in the face of them: for they knew these laws were in being. It was made in some year of the reign of the late king: I forget which; but it was made about the time of *building the Mansion-house*. Now if it could be supposed, the City have a power of making such a By-law; it would entirely subvert the Toleration-act, the design of which was to exempt the Dissenters from all penalties; for by such a By-law they have it in their power to make every Dissenter pay a fine of six hundred pounds, or any sum they please; for it amounts to that.

THE professed design of making this By-law, was to get fit and able persons to serve the office: and the Plaintiff sets forth in his declaration, that if the Dissenters are excluded, they shall want fit and able persons to serve the office. But were I to deliver my own suspicion, it would be, that they did not so much wish for their services, as for their fines. Dissenters have been appointed to this office, one who was blind, another who was bedridden; not, I suppose, on account of their being fit and able to serve the office. No; they were disabled both by Nature and by Law.

WE had a case lately in the Courts below, of a person chosen Mayor of a Corporation, while he was beyond the seas, with his Majesty's troops in America; and they knew him to be so. Did they want him to serve the office? No, it was impossible. But they had a mind to continue the former Mayor a year longer, and to have a pretence for setting aside him who was now chosen, on all future occasions, as having been elected before.

IN the cause before your Lordships, the Defendant was by law incapable at the time of his pretended election: and it is my firm persuasion, that he was chosen because he was incapable. If he had been capable, he had not been chosen; for they did not want him to serve the office. They chose him, because without a breach of the law and an usurpation on the Crown, he could not serve the office. They chose him, that he might fall under the penalty of their By-law made to serve a particular purpose: In opposition to which, and to avoid, the fine thereby imposed, he hath pleaded a legal disability grounded on two Acts of Parliament: As I am of opinion, that his plea is good, I conclude with moving your Lordships,

THAT the Judgment be affirmed.

THE Judgment was immediately affirmed, *Nemine contradicente*; and the entry in the Journal is in the following words:

Die Mercurii 4 Februarii 1767.

IT is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, That the Judgment given by the Commissioners Delegates appointed to hear the Errors in a Judgment given in the Sheriff's Court London, and affirmed by the Court of Hustings, reversing the Judgment of the Sheriff's Court and Court of Hustings, be and the same is hereby affirmed; and that the Record be remitted.

F I N I S.

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